SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1899.

No. 290.

JAMES K. BROWN, PLAINTIFF IN ERROR,

vs.

THE STATE OF NEW JERSEY.

IN ERROR TO THE COURT OF OYER AND TERMINER OF HUDSON COUNTY, STATE OF NEW JERSEY.

INDEX.

1 Supreme Court of the United States.

JAMES K. BROWN, PLAINTIFF IN ERROR,
vs.
THE STATE OF NEW JERSEY, DEFENDANT IN ERROR. } On writ of error.

Assignment of error relied upon to reverse judgment below.

Afterwards, to wit, on the twenty-sixth day of April, in the year of our Lord eighteen hundred and ninety-nine, at the October term for eighteen hundred and ninety-eight of the Supreme Court of the United States, at the Capitol, in the city of Washington and District of Columbia, comes the said James K. Brown, by William D. Daly, his attorney, and says that in the record and proceedings in the above-entitled matter therein is manifest error, in this, to wit:

First. Because the said court, before whom, etc., and against the objection of the said defendant, proceeded to try said indictment with a jury drawn and empanelled under an act of the legislature of New Jersey, approved June 14th, 1898, which act is in contravention of the constitution of the State of New Jersey and of the United States, and is therefore unconstitutional and void.

Second. Because the said court, before whom, etc., and against the objection of said defendant, refused to sustain the challenge to the array of the said jury, on the ground that said jury was a struck jury and not a common jury, and therefore unconstitutional and void.

Third. Because the said court, before whom, etc., and against the
2 objection of said defendant, proceeded to try said defendant under said struck-jury act, and the said defendant was thereby denied the due process of law guaranteed by Article XIV of the amendments to the Constitution of the United States.

Fourth. Because the said court, before whom, etc., and against the objection of said defendant, proceeded to try said defendant under a struck-jury law of the State of New Jersey, and the said defendant's rights, privileges, and immunities was thereby denied as guaranteed by the XIV amendment to the Constitution of the United States.

Fifth. Because the said court, before whom, etc., and against the objection of said defendant, proceeded to try said defendant under a struck-jury act of the legislature of New Jersey, and the said defendant was thereby denied the equal protection of the laws within the jurisdiction of the State of New Jersey guaranteed by the XIV amendment to the Constitution of the United States.

Sixth. Because the said court, before whom, etc., and against the objection of said defendant, refused to sustain the challenge to the array of said jury interposed on the grounds that the panel of jurors so struck, by virtue of the act aforesaid, had not been returned by the sheriff, eleven of the forty-eight jurors so struck being not served or summoned, the defendant's rights, privileges, and immunities was thereby abridged as guaranteed by the XIV amendment to the Constitution of the United States.

Seventh. Because the said court, before whom, etc., and against
3 the objection of said defendant, directed that the names of eighteen

absent jurors be placed in the box, to select therefrom a jury to try said cause, and the names of the said absent jurors were drawn from said box to serve as jurors, but did not appear to try said cause, and the conviction of said defendant and judgment were, therefore, without due process of law guaranteed by the fourteenth amendment to the Constitution of the United States.

Eighth. Because the said court, before whom, etc., and against the objection of said defendant, arbitrarily proceeded to empanel a jury to try said cause in the absence of eighteen jurors struck to try said cause, and drawn from the box to serve as jurors, without assigning any sufficient reason or excuse, in contravention of the statutes and the XIV amendment of the Constitution of the United States and of New Jersey, and the defendant was thereby denied the equal protection of the laws within the jurisdiction of the State of New Jersey.

Ninth. Because the State of New Jersey denied the defendant the right to challenge peremptorily twenty of the jurors returned to try said cause, as allowed to said defendant under the laws of the State of New Jersey, but elected to try said defendant under said struck-jury act and allowed the defendant but five peremptory challenges, thereby denying to said defendant the equal protection of the fourteenth amendment to the Constitution of the United States.

Tenth. Because the court of errors and appeals in the last resort of the State of New Jersey affirmed the judgment of the court of oyer and terminer of Hudson County, New Jersey, whereas it should have reversed said judgment.

4 Wherefore, the said James K. Brown prays that the judgment aforesaid may be reversed by reason of the errors aforesaid, and that he may be restored to all things which he has lost on occasion of said judgment, and that the said The State of New Jersey may rejoin to said errors.

WM. D. DALY,
Atty. of Pltff. in Error.

5 Supreme Court of the United States.

JAMES K. BROWN, PLAINTIFF IN ERROR,
vs.
THE STATE OF NEW JERSEY, DEFENDANT IN ERROR. } Notice.

The following papers attached to the assignment of errors herein are the parts of the record in this case on which plaintiff in error relies, and which he thinks necessary for the consideration thereof, and which he desires printed for the hearing of the case in this court.

WM. D. DALY,
Atty. for Pltff. in Error.

6 (Indorsed:) Supreme Court of the United States. James K. Brown, pltff. in error, *vs.* The State of New Jersey, deft. in error. Notice. William D. Daly, atty. for pltff.

7 UNITED STATES OF AMERICA, ss.

The President of the United States of America, to the honorable the judges of the court of oyer and terminer of the county of Hudson, State of New Jersey, greeting:

[Seal of U. S. Supreme Court.]

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said court of oyer and terminer, upon a remittitur from the court of errors and appeals of the State of New Jersey before you, or some of you, being the highest court of law or equity of the said State, in which a decision could be had in the said suit between the State of New Jersey, plaintiff, and James K. Brown, defendant, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the Constitution, or of a treaty or statute of, or commission held under, the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission; a manifest error hath happened to the great damage of the said James K. Brown, as by his complaint appears.

8 We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you that if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington within thirty days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the fifth day of April, in the year of our Lord one thousand eight hundred and ninety-nine.

JAMES H. MCKENNEY,
Clerk of the Supreme Court of the United States.

Allowed to operate as a supersedeas by

GEORGE SHIRAS, Jr.,
Associate Justice of the Supreme Court of the United States.

U. S. OF AMERICA,
State of New Jersey, County of Hudson, ss:

In obedience to the command of the within writ, I herewith transmit to the Supreme Court of the United States a duly certified transcript of the record and proceedings in the within entitled case, together with all things concerning the same.

9 In witness whereof I hereunto subscribe my name and affix the seal of said court of oyer and terminer of the county of Hudson,

and of the said county, State of New Jersey, this 26th day of April, A. D. 1899.

[SEAL.] JOHN G. FISHER, *Clerk.*

10 (Indorsed:) United States Supreme Court. James K. Brown, pltff. in error, vs. The State of New Jersey, on error. W. D. Daly, atty. Presented in open court this 6th day of April, 1899. Job H. Lippincott, P. J., John A. Blair, Judge.

11 UNITED STATES OF AMERICA, ss.

To the State of New Jersey, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to a writ of error, filed in the clerk's office of the court of oyer and terminer of the county of Hudson, State of New Jersey, wherein James K. Brown is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable George Shiras, jr., Associate Justice of the Supreme Court of the United States, this fifth day of April, in the year of our Lord one thousand eight hundred and ninety-nine.

(Signed) GEORGE SHIRAS, Jr.,
Associate Justice of the Supreme Court of the United States.

(Endorsed.)

On this 20th day of April, in the year of our Lord one thousand eight hundred and ninety-nine, personally appeared William A. Aiken before me, the subscriber, a notary public of New Jersey, and makes oath that he delivered a true copy of the within citation to Foster M. Voorhees, governor of the State of New Jersey, at his office in the city of Elizabeth, New Jersey, and that he therein acknowledged service of the
12 same, on the eighth day of April, 1899.

WILLIAM A. AIKEN.

Sworn to and subscribed the 20th day of April, A. D. 1899.

[NOTARY'S SEAL.] JOHN I. WELLER,
Notary Public of N. J.

On this twentieth day of April, in the year of our Lord one thousand eight hundred and ninety-nine, personally appeared William D. Daly before me, the sub., a notary public of New Jersey, and makes oath that he delivered a true copy of the within citation to Job H. Lippincott, presiding judge of the court of oyer and terminer of Hudson County, New Jersey, by handing same to him at the court-house in Jersey City, said county and State, on the eleventh day of April, 1899.

WM. D. DALY.

Sworn to and subscribed the 20th day of April, 1899.

JOHN I. WELLER,
Notary Public of N. J.

Service of a copy of within citation on this April 11/99, acknowledged.

JAMES S. ERWIN
Prosecutor of the Pleas, Hudson Co., N. J.

A true copy of the within citation and of the writ of error was served upon me by delivering the same to me personally April 8, 1899.

FOSTER M. VOORHEES,
Governor.

13 NEW JERSEY, *ss*:

The State of New Jersey to the judges of the court of oyer and [L. S.] terminer of the county of Hudson, holden at Jersey City, in and for said county, of the term of September, in the year eighteen hundred and ninety-eight.

Because in the record and process, and also in the giving of judgment upon a certain indictment against James K. Brown, of the city of Jersey City, in the county of Hudson, for murder, whereof before you he has been indicted, and is thereof convicted by a certain jury of the county, taken between the State of New Jersey and the said James K. Brown, as it is said, manifest error hath intervened to the great damage of the said James K. Brown, as from his complaint we have received information, we being willing in his behalf to correct the error in due manner, if any there be, and that speedy justice be done to him, the said James K. Brown, command you that if judgment be thereon given then you distinctly and openly send, under your seal, the record and proceedings aforesaid, with all things touching the same, to our court of errors and appeals in the last resort in all cases, to be held at Trenton, on the fifteenth day of November next, and this writ, that the record and proceedings aforesaid being inspected we may further cause to be done thereupon for correcting that error what of right and according to the laws and customs of New Jersey ought to be done.

14 Witness Alexander T. McGill, our chancellor and president judge of our said court of errors and appeals, this fourteenth day of November, in the year of our Lord eighteen hundred and ninety-eight.

GEORGE WURTS, *Clerk.*
WM. D. DALY, *Attorney.*

The answer of Job H. Lippincott, justice of the supreme court of judicature of the State of New Jersey, and of John A. Blair, judge of the court of common pleas in and for the county of Hudson, together constituting and holding the court of oyer and terminer within named, the record and proceedings of the plaint whereof mention is within made, with all things touching the same, we certify to our justices of the court of errors and appeals on the last resort in all cases, at Trenton, in the State of New Jersey, at the day and year within contained, in a certain schedule to this writ as we are commanded.

JOB H. LIPPINCOTT, [L. S.]
Justice Supreme Court, State of New Jersey, holding Hudson Oyer and Terminer.

JOHN A. BLAIR, [L. S.]
Judge Inferior Court of Common Pleas in and for County of Hudson, New Jersey.

15 New Jersey court of errors and appeals.

JAMES K. BROWN, PLTFF. IN ERROR,
vs.
THE STATE OF NEW JERSEY, DEF'D'T IN ERROR. } In error.

Assignment of errors.

Afterwards, that is to say on the third Tuesday in November, A. D. eighteen hundred and ninety-eight, before the justices of the court of errors and appeals of the State of New Jersey, comes the defendant, James K. Brown, by William D. Daly, his attorney, and says that in the record and proceedings aforesaid, and also in the matters recited and contained in the said bill of exceptions, and also in the giving of the verdict and judgment aforesaid, there is manifest error in this, to wit:

1. That the said court before whom, &c., at and upon the trial of said issue so joined between the State of New Jersey and the defendant aforesaid, refused to sustain the challenge to the array of the said jury, because said court granted a struck jury to try said cause without good grounds shown for the granting thereof.

2. That the said court before whom, &c., at and upon the trial of the said issue so joined between the parties aforesaid, and against the objection of said defendant, refused to sustain the challenge to the array
16 of the said jury because the act under which such jury was drawn is in violation of the Constitution of the United States and the State of New Jersey.

3. That the said court before whom, &c., at and upon the trial of the issue so joined between the State of New Jersey and said defendant, and against the objections of said defendant, refused to sustain the challenge to the array of the said jury on the ground that the panel of jurors so struck had not been returned by the sheriff into court, so that a jury might be therefrom chosen for the trial of said cause.

4. That the said court before whom, &c., at and upon the trial of the issue so joined between the State of New Jersey and the said defendant, and against the objections of the said defendant, did direct that the names of eighteen absent jurors be placed in the box and that a jury be drawn therefrom for the trial of said cause.

5. That the said court before whom, &c., at and upon the trial of the issue so joined between the State of New Jersey and the said defendant, and against the objections of said defendant, proceeded to the empanelling of a jury to try said cause in the absence of Percy Alberts, Jefferson McWilliams, Henry E. Collins, Frank D. Hunter, Edward J. Hudson, Abraham D. Runyon, Jacob Ringle, Charles M. Hall, James Potter, Benjamin G. De Mott, Harry H. Butts, Smith D. Mackey, David W. Lawrence, who were struck and drawn as part of the forty-eight jurors from
17 which a jury was to be empanelled to try said indictment, no sufficient cause being assigned for their absence or lawful excuse given why they should not appear.

6. That the said court before whom, &c., at and upon the trial of the issue so joined between the parties aforesaid, and against the objections of said defendant, refused to sustain the challenge of said defendant to Edwin F. Manser, and permitted him to be sworn as juror to try said defendant, contrary to the law of the land.

7. That the said court before whom, &c., at and upon the trial of the issue so joined between the parties aforesaid, and against the objections of the said defendant, arbitrarily and of its own motion, permitted said jury to be drawn in the absence of Percy Alberts, John K. Lawton, Edward S. Brown, William H. Furman, Jefferson McWilliams, Henry E. Collins, Frank D. Hunter, Edward J. Hudson, Abraham D. Runyon, Jacob Ringle, Charles M. Hall, James Potter, Benjamin G. DeMott, Harry H. Butts, Smith D. Mackey, and David W. Lawrence, who were struck as part of the forty-eight jurors to try said indictment, and were in fact drawn from the jury box to sit as jurors, or be examined as to their qualifications therefor.

Therefore the said defendant, James K. Brown, prays that the judgment and conviction aforesaid, by reason of the aforesaid errors and all other errors appearing in the record and proceedings aforesaid, be reversed, annulled and held for nothing; and that the said defendant, James K. Brown, as aforesaid, may be restored to all things he has lost on
18 occasion of said judgment and conviction, and that the said State of New Jersey may rejoin to said errors, etc.

WM. D. DALY,
Attorney for and of Counsel with the Defendant.

(To the assignment of errors as filed in the New Jersey court of errors and appeals, common joinder in error filed.)

19 Hudson Oyer and Terminer, September Term, 1898.

THE STATE OF NEW JERSEY, *vs.* JAMES K. BROWN. } Judgment.

On indictment for murder.

STATE OF NEW JERSEY,
Hudson County, to wit:

Be it remembered, that at a court of oyer and terminer, holden at Jersey City, in and for the said county of Hudson, on the first Tuesday of April, in the year of our Lord one thousand eight hundred and ninety-nine, before the Hon. Job H. Lippincott, one of the justices of the supreme court of judicature of the State of New Jersey, and Hon. John A. Blair, judge of the inferior court of common pleas in and for the said county of Hudson, according to the form of the statute in such cases made and provided, by the oaths of James C. Clarke, foreman; William S. Flynn, John McAuley, Simon Mayer, Frank T. Lockwood, Thos. B. Mettam, Henry J. Stilson, Louis Stubenvoll, Richard Schlemm, Romeo Churchill, Joseph P. Riordan, Elias P. Roberts, John V. Burke,
20 Bernard Bertsch, Daniel Cole, Michael King, Leon Abbett, Jacob Strauss, Elmer E. Jordan, William Hunt, William Bassett, Stewart Vanderbeek, William C. Burke, good and lawful men of said county, sworn and charged to inquire for the State in and for the body of the said county of Hudson, it is presented in manner and form following, that is to say, that the bills following are true bills.

JAMES C. CLARKE, *Foreman.*

And the foregoing being presented August 3, 1898, with bills of indictment Nos. 188 and 189, inclusive, it was ordered that the same, except bill of indictment No. 189, should be handed down to the court of general quarter sessions of the peace, and that the said bill of indictment No. 189 vs. James K. Brown should remain herein in this said court for trial, &c.

And further:

21 Hudson oyer and terminer, April term, A. D. 1898.

HUDSON COUNTY, *to wit:*

The grand inquest of the State of New Jersey, in and for the body of the county of Hudson, upon their respective oath, present, that James K. Brown, late of the city of Hoboken, in the said county of Hudson, on the twenty-sixth day of July, in the year of our Lord one thousand eight hundred and ninety-eight, with force and arms, at the city of Hoboken aforesaid, in the county aforesaid, and within the jurisdiction of this court, one Charles Gebhardt, then and there being in the peace of God and this State, did wilfully, feloniously, and of his malice aforethought, kill and murder, contrary to the form of the statute in such case made and provided, and against the peace of this State, the government and dignity of the same.

And the grand inquest aforesaid, upon their oath aforesaid, further present, that the said James K. Brown, on the twenty-sixth day of July, in the year of our Lord one thousand eight hundred and ninety-eight, with force and arms, at the city of Hoboken aforesaid, in the county of Hudson aforesaid, and within the jurisdiction of this court, in and upon one Charles Gebhardt, in the peace of God and of this State then and there being, wilfully, unlawfully, feloniously, deliberately, premeditatedly, and of his malice aforethought, did make an assault, and that he, the said James K. Brown, a certain pistol of the value of five dollars, then and there charged and loaded with gunpowder and leaden bullets,
22 which said pistol he, the said James K. Brown, in his right hand then and there held, to, at, and against the said Charles Gebhardt, then and there wilfully, unlawfully, feloniously, deliberately, premeditatedly, and of his malice aforethought, did shoot off and discharge to, at, against, and upon the said Charles Gebhardt, and that the said James K. Brown, with one of the leaden bullets aforesaid, out of the pistol aforesaid, then and there by force of the gunpowder aforesaid by the said James K. Brown shot off and discharged as aforesaid, then and there wilfully, unlawfully, feloniously, deliberately, premeditatedly, and of his malice aforethought, did strike, penetrate, and wound the said Charles Gebhardt, in and upon the body and chest of the said Charles Gebhardt, giving to the said Charles Gebhardt, then and there with the leaden bullets aforesaid, so as aforesaid shot off and discharged out of the pistol aforesaid, by the said James K. Brown, in and upon the body and chest of him, the said Charles Gebhardt, one mortal wound, of which said mortal wound, he, the said Charles Gebhardt, then and there died.

And so the grand inquest aforesaid, upon their oath aforesaid, do say, that the said James K. Brown, him, the said Charles Gebhardt, in the

manner and by the means aforesaid, wilfully, unlawfully, feloniously, deliberately, premeditatedly, and of his malice aforethought, did kill and murder, contrary to the form of the statute in such case made and provided, and against the peace of this State, the government and dignity of the same.

JAMES S. ERWIN,
Prosecutor of the Pleas.

Presented August 3, 1898.

JOHN G. FISHER, *Clerk.*

23 And afterwards, to wit, on the third day of August, in the year A. D. one thousand eight hundred and ninety-eight, at a session of the court of oyer and terminer, being as yet of the term of April aforesaid, before the honorable Job H. Lippincott, justice as aforesaid, and the honorable John A. Blair, judge of the inferior court of common pleas aforesaid, at Jersey City aforesaid, in the county of Hudson aforesaid, here cometh the said James K. Brown, under the custody of William Heller, esq., sheriff of the county of Hudson aforesaid, in whose custody he had been before committed for the cause aforesaid, being brought to the bar here in his proper person by the sheriff aforesaid, to whom he is also here committed, and having heard the indictment read and forthwith being commanded of and concerning the premises in the said indictment above specified and charged against him, how he will acquit himself thereof, he saith he is not guilty thereof, and therefore for good or evil he puts himself upon the country, and James S. Erwin, prosecutor of the pleas for the said county of Hudson, who prosecutes for the State of New Jersey in this behalf doth the like.

Therefore let the said indictment be continued until, and a jury come here before the honorable Job H. Lippincott, justice as aforesaid, and the honorable John A. Blair, judge of the inferior court of common pleas aforesaid, at Jersey City aforesaid, in the county of Hudson aforesaid, on the third day of October, A. D. one thousand eight hundred and
24 ninety-eight, of twelve good and lawful men of this State, and resident in the county of Hudson aforesaid, over the age of twenty-one years and under the age of sixty-five years, by whom the truth of the matter may be better known, and who are not of kin to the said James K. Brown, to recognize on their oaths whether the said James K. Brown be guilty of the murder in the indictment aforesaid specified, or not guilty thereof, because as well the said James S. Erwin, prosecutor of the pleas for the county of Hudson aforesaid, who prosecutes for the State of New Jersey, in this behalf as the said James K. Brown have put themselves upon the said same jury and the same day is given to the parties aforesaid at the same place, at which time, that is to say, on the third day of October, A. D. one thousand eight hundred and ninety-eight, being of the term of September, A. D. 1898, at Jersey City aforesaid, in the county of Hudson aforesaid, before the judges aforesaid of the court of oyer and terminer, here cometh as well the said James S. Erwin, prosecutor of the pleas aforesaid, who prosecutes as aforesaid, as the said James K. Brown, under the custody of the sheriff as aforesaid, and who, being brought to the bar in his proper person by the said

sheriff, and the jurors of the jury by the sheriff of the county of Hudson aforesaid, for this purpose empanelled and returned, to wit:

1. George Witt,
2. Oliver P. Vreeland,
3. Elliott L. Butler,
4. Alfred W. Booth,
5. George W. Decker,
6. Samuel Adams.
7. Edwin F. Manser,
8. Chas. H. Hitchcock,
9. George W. Hill,
10. Frank Day
11. Besson Apgar,
12. Richard C. Fessenden.

25 being called come, who being chosen, tried, and sworn to speak the truth of and concerning the premises. And thereupon the trial of the said issue commenced before the said court and jury, and was from day to day continued until the fifth day of October, A. D. one thousand eight hundred and ninety-eight, at which date last aforesaid, at Jersey City aforesaid, the said jury in the meantime being kept together in the care of officers of the said court sworn for that purpose, the said issue was, after a charge from the court, submitted to the said jury. And the said jury, in charge of the said officers sworn as aforesaid, were taken to a private room to consider of their verdict, and afterwards, to wit, on the said fifth day of October, A. D. one thousand eight hundred and ninety-eight, the said jury return into and before said court, in charge of the said officers sworn as aforesaid, and then and there, in the presence of the said court and of the said James K. Brown, do say that the said James K. Brown is guilty of the murder aforesaid on him above charged in manner and form aforesaid, as in the aforesaid indictment is above charged against him, and that they designate and find the degree of the said murder is murder in the first degree, and that he is guilty thereof. And, the attorney for the said James K. Brown demanding that the jury be polled, the said jury was accordingly polled, and each and all of said jury responded and said that he and they found the said James K. Brown to be guilty of the murder aforesaid on him above charged in manner and form aforesaid as in the aforesaid indictment is above
26 charged against him, and that he and they designate and find the degree of the said murder is murder of the first degree, and that he is guilty thereof.

And afterwards, to wit, on the fourteenth day of October, A. D. one thousand eight hundred and ninety-eight, being as yet of the September term aforesaid, it was demanded of him, the said James K. Brown, if he hath or knoweth of anything to say whereof the court here ought not to proceed to judgment against him, who nothing further saith unless as he has before said.

Thereupon all and singular the premises being seen and by the court here fully understood,

The sentence of the law is, and it is by the court now here considered and adjudged, that the said James K. Brown be taken by the sheriff of the county of Hudson aforesaid from the bar of this court to the jail of the county of Hudson aforesaid, from whence he came, there to remain in close custody and confinement until Thursday, the eighth day of December, A. D. one thousand eight hundred and ninety-eight, on which day he, the said James K. Brown, be taken by the said sheriff of the said county to the place of execution provided by him according to law, and then and there, on said day, between the hours of ten o'clock in the

forenoon and three o'clock in the afternoon, he, the said James K. Brown, be by him, the said sheriff, hanged by the neck until dead.

Judgment signed this fourteenth day of October, A. D. one thousand eighteen hundred and ninety-eight.

JOB H. LIPPINCOTT,
Justice of the Supreme Court of New Jersey.
JOHN A. BLAIR,
Judge of the Inferior Court of Common Pleas in and for the County of Hudson, New Jersey.

27 Hudson oyer and terminer, September 1st, 1898.

THE STATE OF NEW JERSEY
vs.
JAMES K. BROWN. } Indictment. Murder.

Justice Lippincott and Blair on the bench.

Mr. Van Winkle, assistant prosecutor, for the State.

Mr. Daly for the defendant.

Mr. VAN WINKLE. I now make application for an order for the drawing of a struck jury.

Mr. DALY. We enter an objection to the granting of this application, for the reason that there is no good cause shown or reason appearing for granting it.

Objection overruled and exception allowed.

JOB H. LIPPINCOTT, J. S. C. [L. S.]
JOHN A. BLAIR. [L. S.]

Mr. VAN WINKLE. I shall be obliged to ask the court to name a day at which time the court will be present for the striking of a jury. The requirement of six days' notice has not been changed.

The COURT. The court will grant the motion of the State. The court will be here on the twelfth day of this month, and you can give notice for that day.

28 SEPTEMBER 12, 1898.

Mr. DALY. This being the day upon which the jury was to be struck, upon notice given in accordance with the statute, I object to the striking of the jury, because the statute under which the jury is to be struck is unconstitutional and void.

The court overrules the objection, to which overruling defendant prays an exception may be allowed, and it is allowed, and signed and sealed accordingly.

JOB H. LIPPINCOTT, J. S. C. [L. S.]
JOHN A. BLAIR. [L. S.]

The jury is now struck in accordance with the statute.

OCTOBER 3, 1898.

The COURT. Is the State ready to move the case?

Mr. ERWIN. I move the trial of the indictment of the case of the State against James K. Brown for murder.

The COURT. We have two physicians' certificates that two of the jurors are not able to attend. There are six who do not respond, and no reason is given for their absence.

Mr. DALY. I challenge the array of jurors, on the ground that the panel of jurors as struck by the judge of the oyer and terminer has not been returned by the sheriff into this court, as appears by the record.

The COURT. The venire shows it is returned.

Mr. DALY. The return shows that eleven of the jurors are not
29 found and were not served, and eight served do not appear.

Upon that ground I move to quash the panel, and request that a venire be issued to summon a common jury to try this case. The statute of 1898 provides for a struck jury, and that 96 shall be struck by the court, and that the defendant and the prosecutor from that shall strike 24, leaving 48 from which the panel shall be drawn. Now, the 48 jurors summoned by the sheriff are 11 short, so that the panel of jurors as contemplated by law is not in court, and the statute not having been complied with the panel should be quashed and the sheriff directed to summon a common jury from the body of the county. In addition to this, there is presented two physicians' certificates as to jurors who do not appear and six others who do not appear and no reason given for their absence. I make the objection also that the mere certificate of a physician is not sufficient; the physician should be here to be examined.

The COURT. There is no greater percentage of absentees in this panel than there formerly was under the old practice. There has always been some absentees in a panel of twenty-four, excepting one case, where the entire list of twenty-four answered to their names. The court will overrule the challenge.

To this overruling defendant prays an exception may be allowed, and it is allowed and signed and sealed accordingly.

JOB H. LIPPINCOTT, J. S. C. [L. S.]
JOHN A. BLAIR. [L. S.]

The PROSECUTOR. The State moves the trial of the indictment.
30 The court directs the names of all the panel be put in the box, from which the twelve are to be selected.

Mr. DALY. I object to the placing of the names of the eighteen absentees in the box.

The COURT. If counsel for defendant does not want them in the box, the court will direct that they be taken out. The court will do in that respect as defendant wishes.

Mr. DALY. I shall object to the court directing that they be taken out.

The COURT. Then they may remain in the box.

Mr. DALY. To this ruling defendant prays an exception may be allowed, and it is allowed and signed and sealed accordingly.

JOB H. LIPPINCOTT, J. S. C. [L. S.]
JOHN A. BLAIR. [L. S.]

The CLERK. Two of the absentees now appear, Mr. Booth and Mr. Church. That reduces the number of absentees without excuse to four.

The COURT. I see Mr. Butler has now come into court. There are now three absentees. Now the jury may be drawn from the box.

The crier makes the usual proclamation, and proceeds to draw names from the box as follows:

1. George Witt. Takes his seat in the jury box.
2. Oliver P. Vreeland. Takes his seat in the jury box.

Percy Albers——

The CLERK. He is returned not found.

Mr. DALY. I object to proceeding further, because he does not appear.

31 The COURT. The objection is overruled.

To this ruling defendant prays an exception may be allowed, and it is allowed and signed and sealed accordingly.

JOB H. LIPPINCOTT, J. S. C. [L. S.]
JOHN A. BLAIR. [L. S.]

3. Elliott L. Butler. Takes his seat in the jury box.

Maxwell Abernethy.

(Excused by agreement of counsel on account of illness.)

John K. Lawton.

(Does not appear.)

Mr. DALY. The return shows that he was not found, and I object to further proceedings until he does appear.

The court overrules the objection, to which ruling defendant prays an exception may be allowed, and it is allowed and signed accordingly.

JOB H. LIPPINCOTT, J. S. C. [L. S.]
JOHN A. BLAIR. [L. S.]

Edward S. Brown.

(Does not appear.)

Same objection; same ruling and exception.

JOB H. LIPPINCOTT, J. S. C. [L. S.]
JOHN A. BLAIR. [L. S.]

William H. Furman.

(Does not appear.)

Same ruling and exception.

JOB H. LIPPINCOTT, J. S. C. [L. S.]
JOHN A. BLAIR. [L. S.]

4. Alfred W. Booth. Takes his seat in the jury box.

32 Samuel Graham. Appears and is challenged by the State.

Jefferson McWilliams.

(Does not appear.)

Same objection; same ruling and exception.

JOB H. LIPPINCOTT, J. S. C. [L. S.]
JOHN A. BLAIR. [L. S.]

Henry E. Collins.

(Does not appear.)

Same objection; same ruling and exception.

JOB H. LIPPINCOTT, J. S. C. [L. S.]
JOHN A. BLAIR. [L. S.]

Patrick McConville. Appears, and claims to be over 65 years old. Counsel on both sides consent that he be excused.

Charles W. Allen. Appears and challenged by defendant.
Frank D. Hunter.
(Does not appear.)
Same objection; same ruling and exception.

JOB H. LIPPINCOTT, J. S. C. [L. S.]
JOHN A. BLAIR. [L. S.]

William J. Collins. Challenged by defendant.
Elbridge V. S. Besson. Appears, challenged by State.
Edward Jenkins. Challenged by defendant.
Marcus B. Coughlin. Challenged by the State.
Edward J. Hudson.
(Does not appear.)
The PROSECUTOR. There is a physician's certificate here that he is sick and can not attend.

33 Mr. DALY. Does the court excuse him? It appears by the venire that he was duly served, and the defendant is entitled to his presence in order that he may be examined as to his qualifications, and there is no sufficient excuse appearing for his absence. I object to the further drawing of the jury until he is present.

The court overrules the objection, to which ruling defendant prays an exception may be allowed, and it is allowed, and signed and sealed accordingly.

JOB H. LIPPINCOTT, J. S. C. [L. S.]
JOHN A. BLAIR. [L. S.]

5. George W. Decker. Takes his seat in the jury box.
Allan Church. Upon application of the juror, for business reasons, by consent of counsel on both sides the juror steps aside for the present.
Abraham D. Runyon.
(Does not appear.)
Same objection, same ruling and exception.

JOB H. LIPPINCOTT, J. S. C. [L. S.]
JOHN A. BLAIR. [L. S.]

Jacob Ringle.
(Does not appear.)
The CLERK. He is returned as not served.
Harry Hunt. Challenged by the State.
John Troll. Appears, and asked to be excused on the ground that he is over 65 years of age. Counsel on both sides consent that he stand aside.
Walter A. Walsh. Challenged by defendant.

34 William T. Goulard. Challenged by the State.
Charles M. Hall.
(Does not appear.)
Same objection, same ruling and exception.

JOB H. LIPPINCOTT, J. S. C. [L. S.]
JOHN A. BLAIR. [L. S.]

James Potter.
(Does not appear.)
Same objection, same ruling and exception.
6. Samuel Adams. Takes his seat in the jury box.

George C. Fountain. Claims exemption as a militiaman.
Counsel on both sides agree that he may stand aside.
William J. Clarke, jr. Challenged by defendant.
Richard C. Fessenden. Is permitted by counsel on both sides, upon his request for business reasons, to stand aside for the present.
7. Edwin F. Manser. Appears.
The COURT. The juror states to the court that he thinks he is not well enough to serve.
Mr. DALY. I challenge him on the ground that he is physically incompetent to sit as a juror.
The COURT. That is not a good ground of challenge. The juror must determine that for himself.
Mr. DALY. I offer to sustain my challenge by an examination of the juror himself as a witness.
The COURT. We overrule the offer. To this ruling defendant prays an exception may be allowed.

JOB H. LIPPINCOTT, J. S. C. [L. S.]
JOHN A. BLAIR. [L. S.]

35 The juror takes his seat in the jury box.
8. Charles H. Hitchcock. Takes his seat in the jury box.
Benjamin G. De Mott.
(Does not appear.)
Same objection, same ruling and exception.

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JOHN A. BLAIR. [L. S.]

Robert Allen. Appears, and claims exemption as an exempt fireman with certificate filed.
The COURT. The juror may stand aside unless counsel object.
No objection being made, the juror stands aside.
William D. Reynolds. Appears, and claims exemption the same as the last juror with the same result.
Harry H. Butts.
(Does not appear.)
Same objection, same ruling and exception.

JOB H. LIPPINCOTT, J. S. C. [L. S.]
JOHN A. BLAIR. [L. S.]

9. George W. Hill. Takes his seat in the jury box.
Henry Harms. Appears, and says: "I am against capital punishment."
The PROSECUTOR. We do not object to his standing aside for the present.
Mr. DALY. We do not object.
The COURT. You may stand aside because counsel consent to it.
Clayland Tilden. Claims exemption as an exempt fireman
36 with certificates filed, and is permitted to stand aside.
Smith D. Mackey.
(Does not appear.)
The COURT. We have this certificate: "Dr. S. Wellman Clark, 110 Mercer Street, Jersey City, N. J. This is to certify that Mr. Smith D. Mackey is under medical treatment for neurasthenia and digestive dis-

turbances, which unfit him for the strain incident upon a jury trial. Such duties would interfere with his treatment seriously.

"S. WELLMAN CLARK, M. D.

"Sept. 23, 1898."

Defendant makes the same objection as in a similar case before; same ruling; exception.

JOB H. LIPPINCOTT, J. S. C. [L. S.]
JOHN A. BLAIR. [L. S.]

David W. Lawrence.

(Does not appear.)

10. Frank Day. Takes his seat in the jury box.

11. Besson Apgar. Takes his seat in the jury box.

The CLERK. The panel is now exhausted.

The COURT. Put the names in the box of those who have been permitted to stand aside.

The crier does as directed, and takes out as follows:

Robert Allen. Insists upon his exemption as an exempt fireman, and is permitted to stand aside.

12. Richard C. Fessenden. Takes his seat in the jury box.

The foreman, George Witt, says to the court: I am opposed to capital punishment.

37 The COURT. It may be that members of the court are also opposed to capital punishment, but we perform our duties under the law.

The jurors, all having been sworn, each one separately as he approached the jury box, and their names having all been called, and all appearing in the jury box, the prosecutor opens the case and offers evidence as follows:

(Here follows the testimony of witnesses and the evidence in the case.)

38 *Opinion of court of errors and appeals of New Jersey.*

Error to court of oyer and terminer, Hudson County; before Justice Lippincott.

James K. Brown was convicted of murder and he brings error. Affirmed.

William D. Daly, for plaintiff in error. James S. Erwin, for the State.

Depue, J. The plaintiff in error was indicted for the murder of Charles Gebhardt, a police officer of the city of Hoboken. The indictment was found in the court of oyer and terminer of the county of Hudson. It contained two counts: First. The statutory form prescribed by section 45 of the act regulating proceedings in criminal cases. Revision, p. 275 (P. L. 1898, p. 866, § 36). The second count is in the common-law form, charging the killing to have been done "willfully, unlawfully, feloniously, deliberately, premeditatedly, and with malice aforethought." The contention is that, in order to charge the act of killing for which the accused was put on trial, the allegation should have been of the killing of a police officer. This contention is without substance. An indictment in the statutory language, that the defendant did "willfully, feloniously, and with malice aforethought kill and murder the deceased," is

sufficient. Graves v. State, 45 N. J. Law, 203, 347; Titus v. State, 49 N. J. Law, 36; 7 Atl., 621. At common law and independently of our statute, an indictment for killing an officer might well be in form general, that the prisoner felonice, voluntarie, et ex malitia fua præcognitia, etc., without alleging any special matter. Mackalley's Case, 9 Coke, 67.

The accused was tried before a struck jury and was convicted of murder of the first degree. The statute under which the jury in this
39 case was struck confers on the supreme court, court of oyer and terminer, and court of quarter sessions, or on any judge thereof, on motion on behalf of the State or the defendant in any indictment, power to order a jury to be struck for the trial thereof, and provides that upon making such order the jury shall be struck, served, and returned in the same manner as in the case of struck juries ordered in the trial of civil cases, except as by the act provided. P. L. 1898, p. 894, § 75. The order for a struck jury in this instance was made by the court on the application of the prosecutor. The method in which the jury is struck in civil cases is found in the Revision, and is substantially the same as the method of striking juries in England. The party applying for such struck jury is required to give six days' previous notice to the adverse party or his attorney, and to the judge, sheriff, or other officer, of the time and place of striking such jury, at which time and place the judge shall, in the presence of the parties or their agents or attorneys, or such of them as shall attend for that purpose, select and transcribe the names of 48 persons so qualified, with their places of abode, "as he shall think most impartial and indifferent between the parties, and best qualified as to talents, knowledge, integrity, firmness, and independence of sentiment, to try the said cause;" and thereupon the party applying for such jury, his agent, or attorney shall first strike out one of the said names, and then the adverse party, his agent, or attorney shall strike out another, and so on alternately until each shall have stricken out 12; but if the adverse party shall not attend such striking, nor any person in his behalf, then the judge shall strike for him; and when each shall have stricken out 12, as aforesaid, the remaining 24 shall be the jury to be returned to try the said cause, which list shall be delivered to the sheriff or other officer who ought to summon such jury, together with the venire facias, by the person applying for such jury, etc., at least 10 days prior to the day appointed for the trial of said cause; and such sheriff or other officer shall thereupon annex the said list to the said venire facias, and return the same as the panel of the jury to try the said cause, and summon them according to the command of the writ. Revision, p. 527, §§ 18–26; 2 Gen. St., p. 1849. The act of 1898, in its modification of the law relating to struck juries in criminal cases, provides for the selection of 96 persons in the list from which the jury is to be struck, and provides that 24 names shall be struck by the prosecutor and by the accused, respectively, in the usual manner, and the remaining 48 names shall be returned as the panel of jurors, and the names placed in the box by the sheriff, and the jury for the trial of the case be drawn in the usual way. P. L. 1898, p. 895, § 76. This act further provides that, on the trial of any indictment for which a struck jury shall be summoned and returned, five peremptory challenges shall be allowed to the defendant, and the same

number to the State. Id., p. 896, § 81. By 22 Hen. VIII, c. 14, persons indicted for petit treason, murder, or felony were admitted to challenge peremptorily 20 of the jurors returned. This statute was in force in England at the time of the Revolution. By act of the legislature passed in 1795 it was provided that every person indicted for treason, murder, or other crimes punishable with death, or for misprision of treason, manslaughter, sodomy, rape, arson, burglary, robbery, or forgery was admitted to challenge peremptorily 20 of the jurors; and it was further provided that neither the attorney-general nor any person prosecuting for or in behalf of the State should be admitted in any case to challenge any juror without assigning a cause certain, and that the privilege of peremptory challenges should not be allowed to offenders in any cases except such as are specified above. R. L., p. 184. These provisions are contained in section 6 of the Revision of 1845, with the addition thereto of perjury and subornation of perjury. Rev. St., p. 294. Struck juries were allowed in England in the trial of civil cases from an early period, and by 3 Geo. II, c. 25, were authorized in criminal cases on the trial of an indictment or information for any misdemeanor or information in the nature of quo warranto. The statute did not apply to indictments for treason or felony, and consequently a special jury in England was not allowed in cases of treason or felony. 21 Vin. Abr., p. 301, tit. "Trial" (D, e, 2). This statute was embodied in the act of 1797 as section 14, with the proviso that it should "not extend to any indictment for any offense where the party is entitled to challenge peremptorily or without cause shown" (R. L., p. 313), and was included in the act concerning juries and verdicts in the Revision of 1845 (Rev. St., p. 968). In the Revision of 1874 it was embodied in the act concerning juries, without the exception contained in section 14 of the act of 1797, and the right to order a struck jury was thereby conferred on the trial of any indictment. Revision, p. 527, § 12. The statutory provisions with respect to struck juries, as contained in the Revision of 1874, were retained in the act of 1898 with modifications with respect to the number of jurors to be selected and the number to be struck by the prosecutor and the accused, respectively, and also allowing to the prosecutor and the accused each five peremptory challenges. P. L. 1898, pp. 894–896, §§ 75–81. Peremptory challenges allowed to the accused on the trial of criminal cases are now regulated by sections 80 to 83, inclusive, of the act of 1898. Every person indicted for treason, murder, etc., is admitted to challenge peremptorily 20 of the jurors summoned, and the State is entitled to challenge peremptorily 12; and, on the trial of an indictment where 20 peremptory challenges are not allowed, the defendant and also the State are entitled each to challenge peremptorily 10 of the general panel of jurors summoned and returned. These two provisions do not apply to trials where a struck jury is ordered. In such cases the number of peremptory challenges allowed as the jury is drawn from the box is limited to 5 by the defendant and the same number by the State. The record shows that application was made to the court by the prosecutor of the pleas for a struck jury, and that the court granted the motion and fixed September 12th as the time for striking and directed notice to be given for that day. On that day the counsel of the prisoner appeared and objected to the striking of the jury on the

ground that the statute under which the jury was to be struck was unconstitutional and void. The court overruled the objection and exception was taken.

By const. 1776, art. 22, it was provided "that the inestimable right of trial by jury shall remain confirmed as part of the law of this State without repeal forever." The provisions on this subject in const. 1844, art. 1, § 7, are as follows: "The right of a trial by jury shall remain inviolate, but the legislature may authorize the trial of civil suits when the matter in dispute does not exceed fifty dollars by a jury of six men." Section 8 provides that "in all criminal prosecutions the accused shall have the right to a speedy and public trial by an impartial jury; to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel in his defense."

Two grounds are alleged in the brief of the counsel of plaintiff in error for the contention that the act of 1898 is unconstitutional: First, because the crime with which he was charged was a felony at common law, and a struck jury could not be had at common law in cases of felony, and hence under our constitution the legislation for struck juries in capital cases is unconstitutional; second, that, being tried by a struck jury, the accused was deprived of his common-law right of 20 peremptory challenges.

Trial by jury as the means of determining questions of fact is of great antiquity. Its origin, notwithstanding the investigations to which the institution has been subjected, still remains in obscurity. In the Mirror of Justice satisfactory evidence is furnished that in criminal cases in the time of King Alfred trial by jury was trial by a jury of 12 men, who were sworn, and whose verdict was required to be by the concurrence of all. It is said that King Alfred caused 44 justices in one year to be punished for false judgment. In the enumeration given it is stated that he punished Cadwine "because that he judged Hackwy to death without the consent of the jurors, whereas he stood upon the jury of twelve men, and because three would have saved him against nine Cadwine removed the three and put others upon the jury, upon which Hackwy put not himself." "He punished Markes because he judged During to death by twelve men who were not sworn." "He punished Freburne because he judged Harpin to die, whereas the jury were in doubt as to their verdict, for in doubtful cases one ought rather to save than to condemn." Mirror Just., c. 5, par. 108 (3), (7), (15). The most ancient traces of trial by jury, qualified by an oath, and consisting of 12 men, says Selden, the antiquarian, "are to be found in the law of the King Ethelred, which provided that in every hundred let there be a court; then let twelve freemen of mature age, together with their foreman, swear upon the holy relics that they will condemn no innocent and absolve no guilty person." Selden's Discourses (Bacon's ed.), c. 6, p. 37. Mr. Justice Wilson, of the Supreme court of the United States, in his lectures on the law, referring to the evidence on this subject, says that "to King Alfred the world is indebted for the unanimous duodecemviral judgment." 2 Wilson's Works, pp. 327–349. Mr. Finalson, in his note to 1 Reeve, Eng. Law, p. 474, says: "It is certain that in Alfred's time there was trial by jury in criminal cases, and equally certain that jurors in those days were witnesses, and that if there were no witnesses, as there could hardly be in many criminal

cases, as murder, there could be no trial by jury, and therefore the ordeal was resorted to in default of witnesses; * * * that there can be no doubt that trial by jury very gradually superseded every other mode of trial." He also refers to a passage in the Mirror (temp. Edw. I) "which complains that the people were not allowed trial by the miracle of God, as the ordeal was called." Sir Edward Coke says: "This trial of the fact is very ancient, and was the law before the Conquest." 1 Co. Litt., 155b. Mr. Reeves says that it was not till the reign of Henry II (which was before Magna Charta) that the trial by jurors became general, and that the progress made in bringing this trial into common use was attributed to a law enacted by that king, which ordained that all questions of seisin of land should be tried by a recognition of 12 good and lawful men sworn to speak the truth. The proceeding was called "per assisam" and "per recognitionem," and the persons composing it were called "juratores, jurati, recognitores assisæ," and collectively "assisa" and "recognitio." The author further says that the oath of 12 jurors was resorted to in other instances than those provided for by this law, and then this proceeding was said to be "per juratam patriæ," or "vicineti, per inquisitionem, per juramentum legalium hominum." This proceeding by a jury was no other than that which had been mentioned as having gained ground by usage or custom. It was sometimes used in questions of property, but it would seem more frequently in matters of a criminal nature. 1 Reeve, Eng. Law, pp. 139, 140. It is conceded by all who have written on
41 this subject that before Magna Charta trial by jury was a trial before a tribunal established for the determination of matters of fact, consisting of 12 men, whose decision could only be by the consent of all. The words "trial by jury" had a definite and fixed meaning at the time of Magna Charta, as well settled as any other term known to the common law. Consequently, when by Magna Charta it was "granted also and given to all the freemen of our realm, for us and our heirs forever, these liberties underwritten," among which are, "no freeman shall be taken or imprisoned, nor disseised, nor outlawed, nor banished, nor in any wise be damaged; nor shall the King send him to prison by force, except by the judgment of his peers or by the law of the land." Trial by jury, as previously known to the law, was comprised in the phrase "legal judgment of his peers or by the law of the land." Id., p. 246, note. The qualification of jurors and the means by which they were to be selected and impaneled constituted no part of the essential features of trial by jury at common law. Thus in the earlier period jurors found their verdicts upon their own knowledge of the matters of fact, and consequently they were frequently called 12 witnesses and their verdicts the testimony of 12 credible men; and they were selected from the villa or place where the offense was committed or the dispute arose, and it was a good cause of challenge to the array that there were not upon the panel returned by the sheriff a sufficient number of hundredors. Arundel's Case, 6 Coke, 14. This practice had fallen into disuse, without being changed by statute, until 24 Geo. II, c. 18, by which jurors were required to come from the body of the county, and a want of hundredors was no longer a cause of challenge. By the common law, jurors were required to be freeholders whose possessions in the whole amounted yearly to above the sum of 500 marks. Fortes., c. 29, p. 67. By 2 Hen. V, c. 3,

on the trial of a criminal case it was provided that jurors should have lands and tenements of the value of 40 shillings per annum. By subsequent statutes the value of jurors' freeholds was changed from time to time, and in cities and boroughs a citizen worth £40 in personal estate was qualified as a juror, though he had no freehold. 2 Hale P. C., 272–274. By the common law the king was entitled to challenge peremptorily any number of jurors, without alleging any reason other than "Quod non boni sunt pro rege." By 33 Edw. I, St. 4, the right of peremptory challenge was taken from the king. By 22 Hen. VIII, c. 14, § 7, made perpetual by 32 Hen. VIII, c. 3, the number of peremptory challenges permitted to the accused arraigned for petit treason, high treason, murder, or felony was reduced to 20. This right of peremptory challenges was allowed only in favor of life, and was never allowed to a person accused of a mere misdemeanor. 1 Chit. Cr. Law, 535. At common law the accused had his challenges for cause without limit, as well as his peremptory challenges. Fortes., c. 27. Parliament never interfered with challenges for cause. Hence it became the common law that the accused had a right to trial by a common-law jury and by an impartial jury, as at common law.

The above, in brief, is a statement of the condition of the English law, so far as is pertinent to the present subject, at the time of the Declaration of Independence. It will be observed, from the course of legislation in England prior to that time, that the subject of qualifications of jurors, as well as the right of peremptory challenges, was a matter of legislation, which was exercised in one instance, at least, to reduce the number of such challenges previously allowed to an accused. Although trial by jury, as that expression was understood at the time of Magna Charta, was guaranteed by that instrument and secured to Englishmen as an inalienable right, the mode in which jurors were selected, their qualification, and extent of the right of peremptory challenges were matters committed to the power of Parliament. It would have been an intolerable grievance to have fixed in the constitution of England unalterably all the details connected with trial by jury which were suitable to a prior age but unsuited to later times. In this country, where the constitutions provide that the right of trial by jury shall remain confirmed as part of the law of the land, or the right of trial by jury shall remain inviolate, the words "trial by jury" import a trial by a jury of 12 men, impartially selected, who must unanimously concur in the guilt of the accused. Consequently, under such constitutional provisions an act of the legislature which provided for a jury in criminal cases of less than 12, or a verdict by the concurrence of less than that number, would be unconstitutional. Thompson v. Utah, 170 U. S., 343–349, 18 Sup. Ct., 620; Work v. Ohio, 1 Benn. & H. Lead. Cr. Cas., 482. The provision in our constitution (article 1, § 8) that the accused should have a right to a speedy and public trial by an impartial jury secured to the accused a right to a trial by an impartial jury by an express constitutional provision. The means by which an impartial jury should be obtained are not defined. In neither of the constitutional provisions on this subject is there any requirement with respect to challenges, or to the qualifications of jurors, or the mode in which the jury shall be selected. These subjects were left in the discretion of the legislature, with no restriction or limitation except that the accused should have the right to be tried by an impartial jury. The

provisions on this subject in Magna Charta, as well as those in our constitution, apply to criminal cases of all grades, misdemeanors as well as common-law felonies. If 20 peremptory challenges are essential to secure an impartial jury, then there has not been in England, nor is there in this State, any constitutional mode of trying criminal cases of a
42 grade less than those enumerated in the statute of Hen. VIII and in the act of 1795. It seems to me that it is inconceivable that a jury should be an impartial jury in the trial of an indictment, say, for having burglars' tools with intent to use them, the penalty for which is imprisonment for the term of seven years, and not an impartial jury on prosecution for burglary actually committed, the punishment for which is seven years, or on an indictment for entering with intent to steal, etc., the penalty for which is also seven years, or an impartial jury in the trial of an indictment for an assault and battery with intent to commit murder, the punishment for which is imprisonment for seven years, and not an impartial jury in the trial of an indictment for manslaughter, etc., the penalty for which is ten years. And yet, if the act of 1795 has become so imbedded in the constitution of this State as to fix a constitutional right to 20 peremptory challenges in an accused upon an indictment for murder, the same constitutional right will inhere in persons accused of any one of the offenses enumerated in that act. It cannot, therefore, be said that such peremptory challenges are at this time allowed in favorem vitæ.

In the treatises on this subject, as well as in the decisions of the courts, there is a consensus of opinion in defining right of trial by jury under constitutional provisions such as ours as it is here defined with respect to the legislative power over trial by jury. An act diminishing the number of a jury, or altering any of its essential features, as, for instance, dispensing with unanimity or depriving a party of challenges for cause—the purpose of which is to exclude jurors who are not impartial—would be clearly unconstitutional; but it is otherwise of a law merely providing the mode of securing a trial by jury. "Although by the common law at the adoption of the constitution a person charged with a capital offense could challenge twenty jurors peremptorily, yet it has been held that a law reducing the number of such challenges to twelve was not unconstitutional, or an infringement of the sacred right of trial by jury." 1 Benn. & H. Lead. Cr. Cas., 495, 496. "The legislature has the power to confer the right to challenge peremptorily upon the parties litigant in civil actions and proceedings, and the State and the accused in criminal cases; and by reason of the power so vested, and so long as the right to trial by jury is preserved, and means are provided whereby impartial jurors can be obtained, it may make changes in existing laws, and increase or decrease the number of challenges to which either the State or the defendant may be entitled." 12 Enc. Pl. & Prac. 478; 1 Bish. Cr. Prac., 941.

The constitution of New York preserves the trial by jury in all cases in which it had been theretofore used. In Walter v. People, 32 N. Y., 147–159, which was on an indictment for murder, the question was whether an act which conferred on the people the right to challenge five of the persons drawn as jurors peremptorily was constitutional; there being no right on the part of the prosecution to challenge peremptorily when the first constitution of the State was adopted. The court sustained the

constitutionality of the act, and in doing so used this language: "This certainly is no limitation of or restriction upon the legislative power, except as to the right guarantied, viz, a jury trial in all cases in which it had been used before the adoption of that instrument. I am not aware of any other constitutional provision that may be supposed to have the remotest bearing upon the question. Trial by jury can not be dispensed with in criminal cases, but it is obviously within the scope of legislation to regulate such trial. I entertain no doubt that it is entirely competent for the legislature to declare that either the people or the accused may have their challenges without assigning cause, and to limit the number of them. The subject of peremptory challenge has always been under legislative control, and it is only within a comparatively recent period that the right has been extended even to the accused in a minor class of criminal offenses. Even if it were a right given by common law, it could be restrained, limited, or withheld altogether, at the legislative will." In Stokes v. People, 53 N. Y., 164, 171–173, which was a writ of error on a conviction for murder, the question was as follows: At common law, a juror having formed or expressed an opinion conclusively proved a want of impartiality, and excluded the juror, without inquiry as to whether this would influence his actions as a juror. An act of the legislature of New York provided that the previous formation or expression of an opinion or impression in reference to the circumstances upon which any criminal action is based, or in reference to the guilt or innocence of the prisoner, or a present opinion or impression in reference thereto, should not be a sufficient ground of challenge, provided the person proposed as a juror should declare on oath that he verily believes that he can render an impartial verdict according to the evidence submitted to the jury on the trial. The question was as to the constitutionality of the act of the legislature. The act was sustained, and the court, in its opinion, held: "The position of the counsel for the accused is that the right of trial by jury is secured to persons accused of felony, by the constitution, and that this secures the further right of trial by an impartial jury. We shall assume the correctness of the latter position. Any act of the legislature providing for the trial otherwise than by a common-law jury composed of twelve men would be unconstitutional and void, and any act requiring or authorizing such a trial by a jury partial or biased against either party would be a violation of one of the essential elements of the jury referred to in, and secured by, the constitution. * * * It will be seen that the
43 intention of the act was not to place partial jurors upon the panel, but that great care was taken to prevent such a result. The end sought by the common law was to secure a panel that would impartially hear the evidence and render a verdict thereon uninfluenced by any extraneous considerations whatever. * * * While the constitution secures the right of trial by an impartial jury, the mode of securing and impaneling such jury is regulated by law, either common or statutory—principally the latter; and it is in the power of the legislature to make from time to time such changes in the law as it shall deem expedient, taking care to preserve the right of trial by an impartial jury."

The courts of Massachusetts and Connecticut, as well as courts of other of our sister States, have held that the legislature may confer upon the prosecution a right of challenge on the trial of capital offenses that did

not exist when the constitution was adopted. Conn. v. Dorsey, 103 Mass., 412; State v. Hoyt, 47 Conn., 518. The constitution of Pennsylvania provides "that the trial by jury shall be as heretofore and the right shall remain inviolate." Article 1, § 6. A statute which conferred upon the State challenges, where challenges were not allowed at the formation of the constitution, was held to be constitutional. Mr. Justice Thompson, delivering the opinion of the court, said: "There is no violation of the right, unless the remedy is denied, or so clogged as not conveniently to be enjoyed. * * * It would be difficult to prove that a limited number of such challenges by the commonwealth necessarily deprives the prisoner of any of his rights. Impartiality is presumed, and is the right of both sides in a criminal trial. To attain this was undoubtedly the object of allowing challenges at all. Whatever, therefore, tends to this end, and no more, surely takes away no right." Warren v. Com., 37 Pa. St., 45; Hartzell v. Com., 40 Pa. St., 462.

In Proff. Jury, § 106, the doctrine is stated in these words: "The legislature may limit the number of peremptory challenges, even in capital cases, without infringing on the constitutional right; for this right is to have twelve free and lawful men, who are impartial between either party, who will by a unanimous verdict find the truth of the issue; and any legislation, therefore, which merely points out the mode of arriving at this object, but does not rob it of any essential ingredients, can not be considered an infringement of the right." In Thomp. & M. Juries, § 163, it is said: "The subject of peremptory challenge has always been under legislative control, and it has been held by a long and unbroken line of decisions that the legislature has power at all times to increase or diminish the number of peremptory challenges to be allowed to the State or defendant in criminal cases." The subject is discussed in the notes to Work v. Ohio, 1 Benn. & H. Lead. Cr. Cas., 482, 492, 496, and the power to increase or diminish the number of peremptory challenges allowed to the State and the defendant, respectively, is affirmed.

In Hayes v. Missouri, 120 U. S. 68, 7 Sup. Ct., 350, Mr. Justice Field, in discussing the office of peremptory challenges, used this language: "The constitution of Missouri, and, indeed, every State in the Union, guaranties to all persons accused of a capital offense, or of a felony of lower grade, the right to a trial by an impartial jury, selected from the county or city where the offense is alleged to have been committed; and this implies that the jurors shall be free from all bias for or against the accused. In providing such a body of jurors, the State affords the surest means of protecting the accused against an unjust conviction, and at the same time of enforcing the laws against offenders meriting punishment. To secure such a body, numerous legislative directions are necessary, prescribing the class from which the jurors are to be taken, whether from voters, taxpayers, and freeholders, or from the mass of the population indiscriminately; the number to be summoned from whom the trial jurors are to be selected; the manner in which their selection is to be made; the objections that may be offered to those returned, and how such objections shall be presented, considered, and disposed of; the oath to be administered to those selected; the custody in which they shall be kept during the progress of the trial; the form and presentation of their verdict; and many other particulars. All these, it may be said in general, are matters

of legislative discretion. But to prescribe whatever will tend to secure the impartiality of jurors in criminal cases is not only within the competency of the legislature, but is among its highest duties. It is to be remembered that such impartiality requires not only freedom from any bias against the accused, but also from any prejudice against the prosecution. Between him and the State the scales are to be evenly held. * * * In this country the power of the legislature of a State to prescribe the number of peremptory challenges is limited only by the necessity of having an impartial jury."

The cases cited affirm the constitutionality of statutes conferring upon the prosecution a right of peremptory challenges, or increasing the number of challenges beyond those allowed at the time of the adoption of the constitution. The act authorizing a struck jury in criminal cases is not unconstitutional, in that it allows the State a right to strike from the list an equal number of persons selected as jurors, and to challenge an equal number with the defendant at the time the jury is impaneled. The principle on which these decisions were rested, and which was affirmed as the ground of decision, applies as well to statutes which reduce the number of challenges allowed to the accused, provided an impartial jury is secured. It was accordingly held in Dowling v. State, 5 Smedes & M., 664, that a statute that reduced the number of peremptory challenges allowed to a prisoner to 12 in
44 capital cases was not an infringement of the clause of the Constitution which provided that the right of trial by jury should remain inviolable. I find on examination in several of our sister States, whose jurisprudence is founded upon the common law, and with constitutional provisions on the subject of trial by jury in criminal cases similar to ours, the number of peremptory challenges in the trial of capital cases has been reduced below the number that existed in England at the time of the separation. In California, in capital cases, or where the punishment is imprisonment for life, the defendant has 10; the State 5. In Colorado the people and the accused are entitled each to 15 in capital cases. In Florida, in capital cases, the State has 6; in cases not capital, the State and the defendant have 4 each. In Kansas, in capital cases, or where the punishment is imprisonment for life, the defendant has 12; the State 6. In Maine, in capital cases, the defendant may challenge 10 while the jury is being formed, and 1 more after it is complete. In Mississippi, in capital cases, the defendant has 12; the State 6. In Nebraska, in capital cases, the defendant has 16; the State 3. In Nevada, in capital cases, the defendant has 10; the State 5. In Oregon, in capital cases, or where the punishment is imprisonment for life in the penitentiary, the defendant has 12; the State 6. In Vermont, in all criminal prosecutions in the county court, the defendant has 6; the State has 2. In Virginia, upon the trial of a felony, a panel of 16 is formed, from which the defendant may strike 4. The State has no right of peremptory challenge. Thomp. & M. Juries, § 165. Notwithstanding these departures from the common law, I do not find that the power of the legislature to limit or reduce the number of peremptory challenges to the accused was ever contested, except in Dowling v. State, supra, with the result above set out. In State v. McClear, 11 Nev., 39, the constitutionality of a jury law of 1875 was under consideration. The act in question permitted 12

peremptory challenges to the accused and to the State in offenses punishable with death or imprisonment for life, and, in effect, deprived the accused of challenges for cause. The court held the act in this respect to be unconstitutional; that it was not within the power of the legislature to deprive a citizen accused of crime of the right to challenge a juror for actual bias. This decision proceeded on the ground that the Constitution secured to the accused a trial by an impartial jury, and that a statute which impaired the right of challenging for a cause touching the impartiality of a juror was void. A distinction was made in the case between challenges for bias, which exist as a matter of right, and peremptory challenges, which were allowed by favor of the legislature, and had always been regulated by statute.

The course of legislation in England is in affirmance of the right of Parliament to reduce the number of peremptory challenges allowed to an accused, as not being an invasion of the right of trial by jury secured by Magna Charta. Before Magna Charta, any man accused of felony or treason was allowed to challenge for cause without limit, and also to challenge five and thirty of the jurors without assigning cause. Fortes, c. 27, p. 12; 2 Trial per Pais, 600. Such was the condition of the law of England at the time of Magna Charta, and continued to be until 22 Hen. VIII, c. 14, which enacted "that no person arraigned for petit treason, murder, or felony be admitted to any peremptory challenge above the number of twenty;" and by 33 Hen. VIII, c. 23, it was enacted "that in cases of high treason or misprision of treason peremptory challenge should not be allowed." The statute of 1 & 2 P. & M., c. 10, enacted "that all trials for any treason shall be according to the due course of the common law;" and thereupon it was held that the common-law right of challenging peremptorily 35 jurors was restored in cases of treasons. 3 Co. Inst., 27–227; 1 Chit. Cr. Law, 534; 1 Co. Litt. 156b; 2 Hale, P. C., 268, 269. By the common law from time immemorial before Magna Charta, and for upward of three centuries after that charter of liberties, 35 peremptory challenges were allowed the accused in treason or felony. The statutes of Hen. VIII wholly deprived persons accused of treason of peremptory challenges, and reduced the number of peremptory challenges allowed on the trial of indictments for felony from 35 to 20. Magna Charta is styled the "Charter of the Liberties of Englishmen," and occupies in the constitutional law of England the place of our written Constitution, Federal and State; and any act of Parliament contrary to Magna Charta is as completely invalid as acts of the legislature are which contravene constitutional limitations. 3 Co. Inst., 111; 1 Co. Litt., 81a; 2 Inst., 108. There is not in any decision or treatise on the law of England any scruple expressed with respect to the validity of those statutes passed after Magna Charta which reduced the number of peremptory challenges below those which were previously allowed at common law. From Henry VIII until the Revolution the principle was recognized as part of the common law of England that trial by jury consisted in a trial by a jury of 12 men, who should unanimously concur in the verdict, and that the number of peremptory challenges allowed by the common law, or granted by statute from time to time, were matters within the control of Parliament. Such was the common law of England at the Revolution. With full knowledge of the course of legislation in England, and also of the

control permitted to Parliament over the subject of peremptory challenges, it was declared in our first constitution that the right of trial by jury should remain confirmed as part of the law of this colony, without repeal, forever; and in the constitution of 1844, that the right of trial by jury should remain inviolate. And a clause was added that in all criminal prosecutions the accused should have a right to a speedy
45 and public trial by an impartial jury. In State v. Fox, 25 N. J. Law, 589, Chief Justice Green, referring to the clause just quoted, said: "This clause confers upon defendants in criminal cases no new rights. It invests with the constitutional sanction what was previously a common-law right. Every criminal is entitled at common law to a trial by an impartial jury. The question still remains, what constitutes impartiality, or rather, what is the test of evidence of that bias or partiality which disqualifies the juror? This must be settled by common-law principles. The question has undergone such repeated and elaborate discussion that no new light can be hoped for. A further discussion would be misplaced. It is proposed simply to advert to some of the leading cases in the books, and state briefly the grounds on which the decision must rest." The chief justice then proceeded to discuss the grounds of challenge for cause—the method provided by the common law by which jurors who were not impartial were excluded from the jury. It will be observed also that in Stokes v. People the legislature had modified the grounds on which at common law a juror, on a challenge for cause, would be disqualified to become a juror in the trial of a criminal case, and that legislative action was affirmed by the court. The authorities cited exhibit unanimity in judicial opinions affirming the principle that the duty of providing means of obtaining an impartial jury marks the limit of legislative control over the incidents of trial by jury, including the right of challenges.

Struck juries, under the name of "special juries," were resorted to in the English courts at an early period for the purpose of obtaining jurors in the trial of civil cases. In Rex v. Edmonds, 4 Barn. & Ald., 476, which was an indictment for conspiracy, tried before a special jury, Chief Justice Abbott said: "It cannot be, or at least has not hitherto been, ascertained at which time the practice of appointing special juries for the trials at nisi prius first began. It probably arose out of the practice of appointing juries for trials at the bar of the courts of Westminster, and was introduced for the better administration of justice, and for securing the nomination of jurors duly qualified in all respects for their important office." By our statute the judge is required to select the names of such persons qualified as jurors "as he shall think most impartial and indifferent between the parties, and best qualified, as to talents, knowledge, integrity, firmness, and independence of sentiment, to try the said cause." The striking of the jury is upon notice to the prisoner or his counsel. It takes place in the presence of the sheriff and of the prosecutor, and of the accused and his counsel, if they desire to be present. From the 96 names selected, the prisoner or his counsel is permitted to strike 24. The 48 names that remain after the prosecutor and the defendant have completed the striking are returned as the panel from which the jury of 12 men is to be selected. The list from which such panel is to be selected is in the hands of the defendant or his counsel at least 12 days before the

impaneling of the jury. In this instance the list was in the hands of the counsel of the accused from September 13th to October 3d, when the trial began. At the time of the selection of the jurors the accused is allowed to reject 24 names peremptorily, and he is allowed the right to challenge for cause without stint. Ample time is afforded to him between the striking of the panel of jurors to be returned and the time of drawing the trial jury to enable counsel to ascertain grounds of objection to individual jurors which would be available upon a challenge for cause, and the defendant is allowed in addition 5 peremptory challenges as the names are drawn from the box. As the right of challenge is not a right to select, but to exclude, the accused on the striking of the jury has power to exclude 24 at will, and at the drawing of the names from the box to form the jury of 12 he has in addition 5 peremptory challenges. It may be, as contended by the counsel of the accused, that the striking of 24 names from the list of jurors is not equally advantageous with a challenge in open court, upon a view of the jurors, as their names are called from the box; but the legislative power over challenges is not limited by such a consideration. The power of the legislature is put at issue by this exception. Conceding to that department of the government its legislative functions, which, when within constitutional limitations and restrictions, are beyond the control of the judiciary, the court can not interfere with its discretion on considerations of policy or abstract justice. A clear case of the infringement or invasion of some constitutional right must be disclosed to justify the intervention of the courts to nullify an act of the legislature. The only restriction on the power to legislate on this subject springs from the duty to secure an impartial jury; and it can not be affirmed that the legislature has exceeded constitutional limitations in adopting trial by a struck jury in cases of this character—a mode of trial in force in England, before the separation of the colonies, for the trial of misdemeanors, and in this State, since the Revolution, for the trial of misdemeanors and high statutory crimes. Fowler v. State, 58 N. J. Law, 423, 34 Atl., 682; Moschell v. State, 53 N. J. Law, 498, 22 Atl., 50. Nor can it be successfully maintained that a jury composed of persons of the qualifications contemplated by the struck-jury act, selected as therein provided, with the right to strike off 24 names from the list of persons, and challenges for cause without limit, and the peremptory challenges given by the act, is not an impartial jury for the trial of criminal prosecutions of every grade within the meaning of the constitutional prescription. The statement in the brief of counsel that this mode of trial is at the option of the prosecutor is incorrect.

Either the accused or the prosecutor may apply for such a jury,
46 but neither can obtain it unless, in the judgment of the court, the case is one that is proper to be tried by a struck jury. The same discretion is conferred upon the court in ordering struck juries in civil cases. In New York an act was recently passed providing for special juries by a proceeding analogous to the method of obtaining and selecting struck juries in this State. That act gave to the court, on the application of either the district attorney or of the defendant, authority to grant a trial by a special jury, in its discretion. On an appeal which brought up a conviction for murder, it was insisted by the defendant that this act created two classes of jurors for the trial of criminal cases,

and discriminated unequally, and was therefore in violation of the Constitution. The court of appeals, in a recent case, affirmed the constitutionality of the act, and held that it did not violate the constitutional guaranty of due process of law. People v. Dunn (opinion filed Jan. 10, 1899), 52, N. E., 572. The objection to the mode of trial adopted in this case is without substance, unless words are interpolated in the constitutional provision making peremptory challenges to the number of 20 in this class of prosecution a constituent part of the Constitution; and for that mode of dealing with the Constitution there is no sanction. The exception is overruled.

The next class of exceptions relates to the organization of the trial jury. That a venire was issued and returned appears from the colloquy between counsel, the clerk, and the court. It is not printed in the case. It is stated that 11 of the jurors were returned "Not found." It also appears in the same manner that physicians' certificates were presented to the court that two of the jurors were not able to attend, and that there were three absentees who were not excused. On this condition of the panel, the defendant's counsel moved to quash the panel, and that a venire be issued to summon a common jury to try the case. This motion was denied, and exception was taken. Section 19 of the jury act provides that where a rule for a struck jury is entered it shall remain in force until the cause is tried, and no common jury shall be summoned therein unless the said rule shall be first vacated by the court, except as provided in the statute. Revision, p. 527, § 13. The exception is that where the defendant has a rule for a struck jury, and shall not procure the jury to be struck, and the panel, duly certified, to be delivered to the plaintiff or his attorney 12 days before the day appointed for trial, the plaintiff may issue his venire for a common jury; and if the defendant shall have a rule for a trial by proviso, and the plaintiff a rule for a struck jury, then if the plaintiff shall not procure the jury to be struck, and the panel thereof to be delivered to the defendant as aforesaid, the defendant may issue his venire for a common jury. It is not within the power of the sheriff, in summoning the jury, to deprive the parties of the mode of trial prescribed by the statute, nor is it necessary that the whole number of jurors specified in the panel should be present when the case is called for trial. Patterson v. State, 48 N. J. Law, 381, 4 Atl., 449; Smith v. Smith, 23 N. J. Law, 207; Rex v. Hunt, 4 Barn. & Ald., 430; Rex v. Edmonds, id., 471. No application was made to postpone the trial of the case until two of the jurors had been called, accepted, and sworn. A postponement at that stage of the proceedings was impracticable. During the calling of the jurors to form a jury, two of the jurors summoned were excused by the consent of counsel, and seven of the jurors were permitted to stand aside by consent of counsel. When eleven jurors had been secured, the panel was exhausted, and the court directed the names of those who had been permitted to stand aside to be again put in the box. This was strictly in accordance with the practice. The twelfth juror was obtained from the jurors whose names were put back in the box. The jury who tried the case was obtained from the panel of jurors selected and certified by the court. The exceptions to the several rulings of the court in impaneling the jury are not sustained.

The next exception is to the admission in evidence of a statement made by the prisoner immediately after his arrest. After the killing of the

deceased the prisoner was arrested by Officer Myers. He was searched, and on his person were found a revolver and a black bag containing articles which are described by the police detective as follows: "This is a key opener or key turner. I have seen them on prisoners that have been arrested. It is called a 'key turner.' This other instrument will turn a lock without a key in it. This other one will open the latch in windows. This other is three screw-drivers in one. This other is a jimmy. It will open bureau drawers or a door. This is a bunch of skeleton keys for opening any door. This other is a bunch of common keys." There were 19 keys, 13 of which were skeleton keys and 6 ordinary keys. The officer testified that all the articles, except the screw-driver, he had seen many times, and had found them on burglars and sneak thieves. After the prisoner was searched, and had been examined by the doctor, then, in the presence of Captains Fanning and Hayes, two captains of the police in Hoboken, in the office of the chief of police, the prisoner made a statement. Hayes testified: "I first introduced Captain Fanning to him. I said, 'This is Captain Fanning, and I am Captain Hayes, at the same time acting chief of police. Have you any objection to making a statement to us in regard to this case?' He said, 'No.' I then told him I would take it down in writing, and would use it against him at his future trial, but that it would be voluntarily on his part to give it to me; otherwise, there was no compulsion on him to give it. He said, 'All right.' He then made the statement, and it was reduced to
47 writing by me. I read it to him twice, and he signed his name to it." This testimony was sufficient to make the prisoner's statement competent evidence. Rooesel v. State, 61 N. J. Law, —; 41 Atl., 408. The following is the statement of the prisoner: "James K. Brown; 34 years; born in Jersey City. Number of street, I will not tell. I live in Erie street, J. C.; a carpenter by trade; at present out of work. I am married. I have three children. Q. Who did you work for last? A. I won't state. I came here to-day to look for work. The burglars' tools I was going to throw in the river. As to killing the officer, I am very sorry. I had no intent to do so. I only tried to escape on account of having the burglars' tools. The officer came to me on the corner (Twelfth and Bloomfield). He said, 'What are you doing here?' I answered, 'I expect to find a friend.' 'Who is this with you?' 'A friend of mine.' The reason I answered this way was to get him to walk a block or so, to allay his suspicion. I then attempted to run away from him. He arrested me, knocked me down, and punched me. I tried to get up by placing my hand on his face. He bit my finger. I got up, but he still held to my finger, and my greatest effort could not release it. His hands were then free. He either hit me with the butt of his pistol or stick, which staggered me. I then pulled my hand from his mouth, and dodged to one side, and run. He was directly behind me. Q. Then you were trying to make us believe that you killed him in self-defense? A. I do not. I wanted to escape only. I could not get away. I looked back and saw him with what I supposed was his revolver. I drew my pistol and said to him, 'Go way from me.' He still followed me. I thought he was going to shoot. I pointed my revolver with the intention of frightening him away. I then fired at him three times. Each shot took an effect."

The prisoner was a witness in his own behalf, and it was brought out on cross-examination that he had been a prisoner in the State prison at Sing Sing for two years—from July, 1895, to July, 1897. He declined to answer the question whether he had been in any other prison; he declined to answer the inquiry whether he had been convicted of the crime of burglary in the third degree in the general court of sessions of New York on the 20th of June, 1879; and to the inquiry whether he had been convicted of burglary of the third degree in the city of New York, September 17, 1891, his answer was: "Not in the year 1891. I was convicted, but what date I don't know." To the question whether he was convicted of the crime of grand larceny in the second degree in the court of quarter sessions in June, 1895, he answered, "Yes." This cross-examination was proper, at least for the purpose of showing the character of the prisoner as a witness. 2 Gen. St., p. 1399, § 9. It was competent also with respect to the right of the deceased to arrest him.

The remaining exceptions were directed to the charge of the court.

The deceased was appointed a police officer of the city of Hoboken on the 18th of May, 1891. The transaction which resulted in his death occurred in the afternoon of the 29th of July last, about half past 4. The deceased was on duty at that time in citizen's dress—detailed on detective work. The prisoner, in his testimony, said that he did not know that the deceased was an officer. The deceased and James Buchanan and Alonzo W. Letts were standing on the north side of Twelfth street, between Bloomfield and Garden, about 50 feet west of Bloomfield street. These witnesses testified that they saw the prisoner on the north side, on the corner, standing on Bloomfield street, about 5 feet from the cross walk, looking up and down the street. Letts said the deceased was talking to him, and the prisoner turned and went up Bloomfield street, and entered the flat house on the northeast corner, entered the vestibule, and pulled the door behind him; that the deceased went in there and pulled the man from behind the door and spoke to him; that it seemed to him that the deceased was showing his badge; he rested his hand on the lapel of his coat. Then they came out of the house and together turned up towards Washington street—the prisoner pointing to Washington street. That there was in the conduct of the prisoner that which had excited the suspicion of the officer is apparent from the testimony of the prisoner himself. He testifies that he saw the two men talking, and he thought it very peculiar that they should watch him, and that he thought he had better go in the first doorway he saw and see whether they would follow him any further. It is also apparent from the prisoner's statement at the police office that the deceased in fact had arrested him, and that the shooting by the prisoner was for the purpose of effecting an escape. At common law a peace officer has a right to arrest, without warrant, one whom he suspects to be guilty of felony, although it afterwards appears that no felony was committed, provided he has reasonable cause to suspect that the person arrested has committed a felony. There is this distinction between a private individual and a constable: In order to justify the former in causing the imprisonment of a person, he must not only make out a reasonable ground of suspicion, but he must prove that a felony was actually committed; whereas, a constable, having reasonable ground to suspect that a felony has been committed, is authorized to detain the

party suspected until inquiry can be made by the proper authorities. Reuck v. McGregor, 32 N. J. Law, 70–74; Beckwith v. Philby, 6 Barn. & C., 635; Clark, Cr. Proc., § 12; 1 Benn. & H. Lead. Cr. Cas., 197–202. The distinction between felonies and misdemeanors is not observed in our criminal code. Statutory offenses, if designated at all, are called "misdemeanors" or "high misdemeanors."
48 Jackson v. State, 49 N. J. Law, 255, 9 Atl. 740. The grade of the offense in our criminal code is determined by the character and degree of the punishment prescribed, rather than upon the common-law classification of felonies and misdemeanors. By statute it is made a high misdemeanor, punishable by imprisonment in the State prison for a term not exceeding seven years, if any person shall by day or by night willfully or maliciously break or enter into any dwelling house, or enter by day or night, without breaking, any dwelling house, etc., with intent to steal. P. L. 1898, p. 830, §§ 131–133. By another section an attempt to commit any of the offenses mentioned in the act, or any offense of an indictable nature at common law, though such offense was not actually committed, is made a misdemeanor punishable by imprisonment in the State prison at hard labor for a term not exceeding three years, etc. Id. p. 854, § 216. By another section it is made a high misdemeanor, punishable by imprisonment in the State prison for a term not exceeding seven years, for a person to have in his possession any tool or implement adapted or designed for cutting through, forcing, or breaking open any building, etc., knowing the same to be adapted or designed as aforesaid, with intent to use or employ, or allow the same to be used or employed, for that purpose. Id. p. 830, § 134. A person engaged in the commission of the crimes referred to in the sections of the crimes act above mentioned would, under the rules of the common law, be liable to arrest by an officer without process; and a person having in his possession the implements found in the possession of the accused, with the intent to break into any building, etc., would be liable to arrest by an officer without process. The prisoner testified that he had no intent to break into the house; that he entered the vestibule to escape, because he had in his possession the burglars' tools that he had brought over to Hoboken, not for any criminal purpose, but to get rid of them. But the accused, in the police court, was found in the possession of the tools of a burglar or sneak thief. His conduct in going into the flat was suspicious, and the officer, if he had no knowledge of the antecedents of the accused, had no knowledge of his purpose in going there, and if, acting on his own view of the conduct of the prisoner, he had reasonable grounds to suspect the prisoner's object in going into the vestibule and pulling the door behind him was to commit a criminal offense, he had a right, and it was his duty, to arrest him without process; and the trial court submitted that question, as a question of fact, to the jury.

By section 2 of the act concerning disorderly persons, "any person having upon him any picklock, key, crow, jack, bitt, or other implement, with intent to break into any building * * * or who shall be found in or near any dwelling house," etc., "with intent to steal any goods and chattels, shall be deemed and adjudged to be a disorderly person;" and by section 36 it is made the duty of every constable or other police officer, and lawful for any person, to apprehend, without warrant or process,

any disorderly person, and take him before any magistrate of the county where he shall be apprehended. P. L. 1898, pp. 942–953. The learned judge in his charge excluded from the consideration of the jury these provisions of the disorderly act, and presented the right of a peace officer to arrest without process under the provisions of the crimes act, exclusively. The right of a peace officer to arrest without process under the disorderly act is of prime importance in the maintenance of public peace, especially in the large cities. In Mayor, etc., v. Murphy, 40 N. J. Law, 145–150, Mr. Justice Reed, speaking of the authority to arrest summarily, says: "In this State, by the act concerning disorderly persons, it has been extended to a class of cases which would seem to include almost every instance where the police regulation of any municipality would require speedy treatment." The right of arrest under that statute is referred to, that it may not be inferred that in the judgment of this court it is to be excluded in the consideration of cases of this kind. In Mackalley's Case, 9 Coke, 68, which was an indictment for murder in killing a police officer in making an arrest, "it was resolved that if any magistrate or minister of justice in execution of his office, or in keeping of the peace according to the duty of his office, be killed, it is murder;" and the reason given is that: "It is true that the life of a man is much favored in law, but the life of the law itself (which protects all in peace and safety) ought to be more favored; and the execution of the process of law, and of the officers and conservators of the peace, is the life of the law, and the means by which justice is administered and the peace of the realm kept." The offense of killing an officer in the performance of his duty is provided for by the statute, which enacts that "if any person or persons shall kill any judge, magistrate, sheriff, coroner, constable, or other officer of justice, either civil or criminal, of this State * * * in the execution of his office or duty, or shall kill any assistant, whether specially called in aid or not, endeavoring to preserve the peace or to apprehend a criminal, knowing the authority of such assistant, or shall kill a private person endeavoring to suppress an affray or to apprehend a criminal, knowing the intention with which such private person interposes, then such person so killing as aforesaid shall be guilty of murder." P. L. 1898, p. 824, § 106. It is only where the homicide is of an assistant when aiding an officer in the endeavor to preserve the peace or to apprehend a criminal, or a private person interposing to suppress an affray or to apprehend a criminal, that knowledge of the authority of such assistant, or of the intention with which the private person interferes, is necessary to bring the case within the provision of this statute. The deceased was lawfully in the execution of his office, and within the protection of the statute. Unless the act of killing is justified or mitigated to a less grade of crime, the accused, by force of this statute, was guilty of murder.

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The instruction of the learned judge was that the police officer, having the same powers as a constable or sheriff, in this respect, under the common law, is justified in making arrest without warrant, provided he acts in good faith upon such facts and circumstances as amount to a reasonable and proper ground for suspicion. "If he has reasonable cause to suspect that a felony has been actually committed, he is justified in arresting the parties suspected, although it afterwards appear that no felony

has been committed, and whether his judgment was a proper judgment or not must be left to the jury. * * * He could also arrest an offender, without warrant, for treason, felony, breach of the peace, and some misdemeanors, when committed in his view, or if there existed facts which gave rise to the reasonable judgment to suspect the person arrested to be the guilty party. If these were the circumstances there, the defendant could not complain of his arrest, and could not resist it." The judge, on this subject, further instructed the jury: "Was the accused subject to arrest for any of these supposed crimes? If so, no person could know it any better than he. If the facts were such as to give rise to a reasonable suspicion, no one knew it better than he; and, if he was thus subject to arrest, if in resisting arrest or in his endeavor to escape arrest he killed the officer without the necessity of self-defense, it would be murder of one degree or the other, depending upon whether he deliberately intended to take the life of the officer, or only to do grave bodily harm. I have said that, in order to render the arrest lawful by the officer, it was not necessary that he be guilty of either of the offenses charged against him. The arrest would be lawful, even though he might be innocent. The prisoner could not adjudge for himself whether the facts and circumstances were such as would justify his arrest. The main question for you to determine here is whether he had created facts and circumstances which would give rise to the right to make the arrest; that is, give rise, in the judgment of the officer, to a reasonable cause to suspect him of being guilty." The instruction of the learned judge on this head, in giving effect to the statute referred to, was correct.

The judge instructed the jury that if the act of killing was not excusable or justifiable on the ground of self-defense, and was not reduced to manslaughter, then it would be murder of the first or second degree; the act of killing being established the presumption was that it was murder of the second degree. "* * * If the defendant seeks to reduce it to a lower degree of homicide, he must establish that by the evidence in your minds to your satisfaction; and, if the State demands a verdict of murder of the first degree, the burden is upon the State to establish it beyond reasonable doubt." Murder is by section 107 of the crimes act (P. L. 1898, p. 824) classified into two degrees,—murder of the first degree and murder of the second degree. That section enacts that all murder which shall be perpetrated by means of poison or lying in wait, or by any other kind of willful, deliberate, and premeditated killing, or which shall be committed in perpetrating or attempting to perpetrate certain specified crimes, shall be murder of the first degree, and that all other kinds of murder shall be murder of the second degree. The legislature, in declaring what shall constitute murder of the first degree and what murder of the second degree, created no new crimes, but merely made a distinction with a view to the difference in the punishment. Graves v. State, 45 N. J. Law, 347–358. The act of killing being such as at common law or under the statute would amount to murder, the judge properly charged the jury that the presumption was of murder of the second degree, and that, if the State purposed to raise the degree of criminal responsibility to that of murder of the first degree, it must accept the burden of proving beyond a reasonable doubt that the killing was such as by the section just referred to would constitute murder of the

first degree. In defining the essential qualities of murder of the first degree, the learned judge quoted and adopted the language of the court in Donnelly v. State, 26 N. J. Law, 465–510.

The contention at the trial was that the killing of the officer was justified on the ground of self-defense. The evidence showed: That the prisoner and the deceased came down the steps together, and proceeded into Twelfth street, on the south side, where a struggle ensued between them. That after they had broken away from each other, or the prisoner had broken away from the officer, the prisoner, in backing off or getting away, with the deceased following him, fired three pistol shots at the deceased, one after the other; two of the three shots taking effect in the body of the deceased. The witnesses describe the two men as wrestling, scuffling, fighting. That the prisoner had a pistol, and that the deceased was endeavoring to get it from him. That the prisoner was backing away from the officer, and ran two or three feet, and stopped and turned around. The deceased was after him, as if he wanted to catch him. That, as the deceased was approaching the prisoner, the prioner pulled out the pistol, and fired once. Then the prisoner turned and ran away again, the deceased still pursuing him, and then the prisoner again shot. The officer was also armed with a pistol, which he had in his hand. That he attempted to fire his pistol, but for some reason or other his pistol was not discharged. The statement of the prisoner at the police court is important on this subject. He says: That when the officer came to him, and said to him, "What are you doing?" he answered, "I expect to find a friend." The officer asked, "Who is this with you?" That the prisoner answered, "A friend of mine." "The reason I answered him this way was to get him to walk a block or so, to allay his suspicion. I then attempted to run away from him. He arrested me." "Q. Then you are trying to make us believe that you killed him in self-defense? A. I do not. I wanted to escape, only. I could not get away. I looked back, and saw him with what I supposed was his revolver. I drew my pistol, and said to him, 'Go away from me.' He still followed me. I thought he was going to shoot. I pointed my revolver with the intention of frightening him away. I then fired at him three times. Each shot took an effect." The instructions of the trial court on this subject were: "Taking life in the course of the necessary defense of one's person is a legal defense upon an indictment of this kind. But the law, from the highest considerations of public policy, circumscribes the right of one person to take the life of another within narrow limits, and allows it to be exercised only under extraordinary circumstances. The burden of proof of self-defense is upon the prisoner. He must show to the satisfaction of the jury a situation and circumstances under which that right may be lawfully exercised; and, before his defense is complete, those facts and circumstances must appear to bring the act done by the prisoner within the prescribed limits. The weapon that was used here was one capable of producing either death or grave bodily harm. The shots were delivered upon a vital part of the officer's body, and resulted in immediate death. The question for the decision of the jury is, upon this matter, whether this act of the prisoner was an act in the lawful defense of his person. To make his defense available, the justification must be coextensive with the act intended to be done; and the

character of the weapon used, the place where the shot was delivered, the circumstances under which it was delivered, are all to be borne in mind in passing judgment upon the defense of self-defense set up in this case. Did he kill here in defense of himself, to prevent his own life being taken, or to prevent great bodily harm arising to him by reason of the conduct of the officer in making the arrest, or did he do grave bodily injury with the intent of escaping arrest? To kill to escape arrest is not self-defense. The foundation of the right to take life by the way of self-defense is necessity. There must exist a necessity for resorting to violence for self-protection, and necessity for using the means that were used to secure the defense of the person. An accused is justified in using force to defend his person only when force is necessary to accomplish that end. If the injury apprehended could be otherwise avoided, the prisoner was bound to avoid the danger without resorting to violence; and, even if the circumstances be such as to require the use of force to repel the assault, he will be inexcusable if he carried his defense beyond the bounds of necessity. The danger must be immediate, and must be actual, or else apprehended on reasonable grounds, of which the jury is to judge. The accused could not make his judgment of the necessity of slaying the deceased in order to defend himself a justification of his act. Whether the necessity for taking life existed must be determined from the situation of the accused at the time, and it is the province and duty of the jury to determine that question. Now, the facts of the shooting are taken by you. Was the officer here, by any action of his own, making this arrest, putting the life of the prisoner in danger, or doing that which would cause him great bodily injury, or was any of his acts in making the arrest such as to warrant an apprehension in the prisoner's mind that his life was in danger, or that grave bodily harm would come to him unless he used the pistol upon the officer, and which demanded of him the act of slaying the officer in order to protect his body from such danger? If the arrest was a lawful one, the officer had a right to use the force necessary to render the arrest effective; and if the prisoner, by his resistance to the arrest, brought violence upon himself, which put his body in danger, that can not be made justification for killing the officer. His duty, the arrest being lawful, was to submit to arrest, if made with the use of no unnecessary force; and, if his resistance caused force to be applied, he can not complain that sufficient force was used to render the arrest effective." The errors assigned on that part of the charge are (1) with respect to the instruction that the burden of proof of self-defense is on the prisoner, that he must show to the satisfaction of the jury a situation and circumstances under which the right of self-defense could be lawfully exercised, and, before his defense is complete, those facts and circumstances must appear to bring the act done by the prisoner within the prescribed limits; and (2) the instruction that "to kill to escape arrest is not self-defense;" and (3) that the accused could not make his judgment of the necessity of slaying the deceased in order to defend himself a justification of his act; that it was the province of the jury to determine that question.

"In every charge of murder, the fact of killing being first proven, all the circumstances of action, necessity, or infirmity are to be satisfactorily proven by the prisoner, unless they arise out of the evidence produced

against him; for the law presumeth the fact to have been founded in malice, until the contrary appear. The matters tending to justify, excuse, or alleviate must appear in evidence, before he can avail himself of them." (Fost., Crown Law, 255.) Mr. Justice Blackstone, speaking of acts
51 justifying a homicide, or excusing it, or mitigating it to manslaughter, says: "All these circumstances of justification, excuse, or alleviation it is incumbent upon the prisoner to make out to the satisfaction of the court and jury, the latter of whom is to decide whether the circumstances alleged are proved to have actually existed; the former, how far they extend to take away or mitigate guilt; for all homicide is presumed to be malicious, until the contrary appeareth in evidence." (4 Bl. Comm., 201.) "On every charge of murder, the fact of killing being first proved, the law presumes it to have been founded in malice, until the contrary appear; and therefore all circumstances alleged by way of justification, excuse, or alleviation must be proved by the prisoner, unless they arise out of the evidence against him." (1 East P. C., 340.) "Besides the presumptions which a jury may make from circumstantial evidence, there are also presumptions of law. Thus, on every charge of murder, the fact of killing being first proved, the law presumes it to have been founded on malice, till the contrary appear. Therefore all circumstances alleged by way of justification, excuse, or alleviation must be proved by the prisoner, unless they arise out of the evidence produced against him." (3 Russ. Crimes (6th ed.), 360.) This doctrine was declared to be the law in this State as early as State v. Zellers, 7 N. J. Law, 243. The distinction is between the burden of proof in the order of the trial of the issue arising in the case, and the effect of evidence offered either by the State or by the accused, to which the doctrine of reasonable doubt is applied. It would be a novelty in the trial of criminal cases to require the State to disprove affirmatively, beyond a reasonable doubt, every defense that possibly might be made. Mr. Wharton says: "We frequently hear that, after a prima facie case on one side, the burden of proof is shifted to the other side; and this shifting of the burden of proof, which no doubt takes place after a prima facie case, is sometimes confounded with the question of the degree of proof necessary to a verdict. The questions are entirely separate. A defendant may often have the burden of proof imposed on him. But, when the case goes to the jury, there is no essential element in his guilt which must not appear to be proved beyond reasonable doubt." (Whart. Hom., § 647.) The trial court so dealt with this subject, and, while holding that the burden of proof of the situation and circumstances under which the right of self-defense might lawfully be exercised was on the prisoner, instructed the jury that: "The benefit of thereasonable doubt always goes to the defendant, and always is applied in his favor. He is never presumed to be any more guilty than the facts make him, and your conclusion of guilt must be beyond reasonable doubt, in order to convict." The full instructions of the trial judge on the subject of reasonable doubt, as applicable to the entire case, will be stated hereafter.

There is a broad distinction between the obligation to make proof of facts and circumstances upon which a particular defense rests and the effect of such evidence upon the ultimate issue of the trial. In a civil suit for an assault and battery, a justification of son assault, etc., must be

pleaded, and at the trial the burden is on the defendant to prove a justification by way of self-defense commensurate with his assault upon the plaintiff. The feature that distinguishes a criminal prosecution from a civil suit arising out of the same transaction is that in the latter the burden of proving a justification is throughout upon the defendant, but in the criminal prosecution, after the facts are proved which give occasion for self-defense, the accused is entitled to the benefit of a reasonable doubt with respect to his guilt upon the whole case. In such a prosecution, if no facts are shown which would in law give occasion for self-defense, a justification on that ground will disappear from the case; but, if such facts are shown to the satisfaction of the jury, then the jury make their deductions and inferences therefrom, and the issue of the guilt or innocence of the accused is to be determined upon the whole case, according to the accused the benefit of a reasonable doubt which inheres in a criminal prosecution. In some of the cases the doctrine that the burden of proof is ever on the accused, where self-defense is interposed as a justification, is said to be inconsistent with the presumption of innocence. This is an assumption that is in fact unfounded. The presumption of innocence that first arises is that the deceased has done nothing that justified the accused in taking his life, and that presumption continues until overcome by evidence. It would be illogical, as well as unjust, to affix upon the conduct of the deceased the imputation of criminality, which, in the absence of evidence to the contrary, would make the killing justifiable. When a homicide is committed, it would shock a sense of justice to assert without knowledge of the circumstances, that the man who is killed deserved death; and yet the presumption asserted in favor of a prisoner that he has no burden of proof in connection with a justification of that character amounts in substance to the same thing. The accused can have no cause of complaint, if on the trial of the indictment he is required to lay before the court the facts which prompted or induced his acts, if he be accorded the benefit of a reasonable doubt with respect to his guilt or innocence upon the whole case.

The case cited as the leading case against this view is Stokes v. People, 53 N. Y., 164. I do not understand the decison of that case to controvert the rule of the common law with respect to the presumption arising from the act of killing. The justification in that case was by way of self-defense, and the charge of the trial court, which was held to be erroneous, was that: "The fact of killing being conceded, and the law implying malice from the circumstances of the case, the prosecutor's case is fully and entirely made out; and therefore you can have no reasonable doubt as to that, unless the prisoner shall give evidence sufficient to satisfy you that it was justified under the circumstances of the case." The trial judge in his instructions also charged that: "Ordinarily, naturally, and properly, in cases of this kind, juries are disposed to, and should, give the prisoner the benefit of any reasonable doubt that may exist in the case; and I do not know that even this is an exception to that rule. If the evidence shall be doubtful upon that subject, if you should entertain reasonable doubts, if the evidence is evenly balanced, so that you do not know where the truth lies, the prisoner would be entitled to the benefit of that doubt."

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The learned judge who delivered the opinion of the court of appeals of New York, in commenting on this instruction, said (page 178) that: "The benefit of the doubt to be given to the prisoner should not have been restricted to their finding of the evidence evenly balanced, so that they did not know where the truth lay. On the contrary, the instruction would have been not to convict of that crime unless convinced by all the evidence in the case that he was guilty, and that if a careful examination of all the evidence left in their minds reasonable doubt of his guilt, they should give the prisoner the benefit of an acquittal. This instruction was warranted by the common law of England." The learned judge adds: "But the question in this case is not what was the rule of the common law as to the implication of malice from the act, whether such rule is deduced from authority or principle and legal analogy. The question arises upon the statute of the State by which homicide is made justifiable or excusable, murder in the first or second degree, or manslaughter in one of four degrees, determinable by the intention and circumstances of its perpetration. Under the statute it is obvious that mere proof that one has been deprived of life by the act of another utterly fails to show the class of homicide under the statute." The court did not overrule, or even cite, the earlier case (People v. Schryver, 42 N. Y., 1), in which it was held, on an indictment for manslaughter, where it was claimed that the killing was done in self-defense, that on such a claim of justification the accused must take upon himself the burden of satisfying the jury by a preponderance of evidence, and must produce the same degree of proof that would be required if the blow inflicted had not ensued in death, and he had been indicted for assault and battery, and had set up a justification. It may be inferred from the fact that, in the Stokes Case, People v. Schryver was not overruled, as well as from the language of the judge in pronouncing the judgment, that that decision was placed upon the statute, and not upon the common law. Other authorities in elucidation of the principle that the burden is on the accused of proving the facts and circumstances upon which jusitification or mitigation rests will be cited in considering another branch of this case.

At the close of the evidence on the part of the State in this case, and upon the proof adduced at that stage, there was no ground on which justification by way of self-defense could be rested. The defense, if permissible at all, arose from the testimony of the defendant himself. The charge of the judge, that the burden was on the accused to prove the facts and circumstances necessary for such a defense, was in accordance with the doctrines of the common law, which at an early period of our judicial history were adopted, and have been recognized as the law without dissent, it is believed, down to the present time. The instructions with respect to the circumstances under which an accused is justified in resorting to self-defense with the weapon that was used were correct. "The right of self-defense has always been regarded as founded on necessity, and is in no case permitted to extend beyond the actual continuance of that necessity by which alone it is warranted." 1 East. P. C., 271–278. "Before a person can avail himself of the defense that he used a weapon in defense of his life, he must satisfy the jury that that defense was necessary to protect his own life, or to protect himself from such serious

bodily harm as would give him a reasonable apprehension that his life was in immediate danger." 3 Russ. Crimes (6th Ed.), 208. And again: "It should further be observed, as the excuse of self-defense is founded on necessity, it can in no case extend beyond the actual continuance of that necessity by which alone it is warranted." Id., 211, 212; 1 East. P. C., 293; Fost. Crown Law, 273–279. In State v. Wells, 1 N. J. Law, 424, which was an indictment for murder, on a defense that the killing was done by way of self-defense, and a conviction of murder, the supreme court held that "no man is justified or excusable in taking the life of another unless the necessity for so doing is apparent as the only means of avoiding his own destruction or some great injury, neither of which appears to have been reasonably apprehended in the present case." Justification for taking life by the use of a deadly weapon results from the situation of the accused at the time the fatal wound was given. Whether his situation was such as to warrant resort to such means to protect himself from a danger, actual or apprehended on reasonable grounds, and whether before the fatal wound was given the accused had done everything exacted by the law to avoid taking life, involve the determination of questions of fact. The accused cannot make his own judgment of the necessity of slaying the deceased his justification. The judge properly instructed the jury that whether the necessity for taking life existed must be determined from the situation of the accused at the time, and that it was the province of the jury to determine that question. Whether the arrest of the prisoner by the deceased was lawful was correctly submitted
53 to the jury. If, in the finding of the jury, the arrest was lawful, it would be superfluous to discuss the question whether it would be justifiable in the accused to kill the officer in order to effect an escape.

The instructions of the trial judge with respect to manslaughter are also under exception, on which errors have been assigned. The trial judge instructed the jury that, the killing being established, the presumption was that it was murder of the second degree, and that, "if the defendant desired to reduce it to a lower degree of homicide, he must establish that by the evidence, in your minds, to your satisfaction." Citation has already been made of some of the common-law authorities with respect to the presumption from the act of killing, and the burden of proof on the question of justification and mitigation. A reference to a few of the leading cases and authorities more particularly applicable to a mitigation of the offense to manslaughter will be made. Mackalley's Case, 9 Coke, 67, which has already been cited, was an indictment for murder in killing a police officer who had arrested and had another in custody. The case was heard en banque, on a special verdict, before all the judges of England. "It was resolved, if one kills another without provocation, and without malice prepense which can be proved, the law adjudges it murder, and implies malice; * * * and therefore, when he kills one without provocation, the law implies malice; and in both these cases they may be indicted generally, that they killed of malice prepense, for malice implied by law given in evidence is sufficient to maintain the general indictment." In Legg's Case, J. Kel., 27, the accused was indicted for the murder of R. W. It was held by the court that "it was upon evidence agreed that if one killed another, and no sudden quarrel appeareth, this is murder, as in Mackalley's Case, and it lieth on the party indicted to prove the sud-

den quarrel." These principles were adopted in Oneby's Case, 2 Ld. Raym., 1494; 2 Strange, 766. Raymond, C. J., in giving answers to the objections which were made on behalf of the prisoner, and which had been duly weighed and considered by the court, said: "One objection to the verdict was that the homicide was upon a sudden quarrel, and so but manslaughter, whereupon the court stated the rule thus: In answer to this objection, I must first take notice that when a man is killed the law will not presume that it is upon a sudden quarrel, unless it is proved to be; and therefore in Legg's Case it was agreed, upon evidence, that if A. kills B., and no sudden quarrel appears, it is murder, for it lies upon the party indicted to prove the sudden quarrel." In 1 Hawk. P. C., c. 31, § 32, it is laid down that "whenever it appears that a man killeth another, it shall be intended prima facie that he did it maliciously, unless he can make out to the contrary, by showing that he did it on sudden provocation," etc. The general doctrine of the law, as stated in the latest edition of Russell, is that: "Whenever death ensues from the sudden transport of passion or heat of blood upon reasonable provocation, and without malice, it is considered as solely imputable to human infirmity, and the offense will be manslaughter. It should be remembered that the person sheltering himself under this plea of provocation must make out the circumstances of alleviation to the satisfaction of the court and jury, unless they arise out of the evidence produced against him, as the presumption of law deems all homicide to be malicious until the contrary is proved." 3 Russ. Crimes (6th Ed.), p. 172. Citations to the same effect from Foster, Blackstone, and East have already been made; and it is believed that this principle is sustained by the English text-books and decisions, without any qualification or dissent. It was adopted in this state in the Zellers Case, 7 N. J. Law, 243.

In Com. v. York, 9 Metc. (Mass.), 93 (a case which has been considsidered as the leading case in this country), it was held that: "On a trial for murder, if the killing be proved to have been done by a wound willfully inflicted with a deadly weapon upon a vital part with great violence, and nothing further is shown, the presumption of law is that it was malicious and an act of murder. The proof of excuse or extenuation lies on the defendant, which may appear either from evidence adduced by the prosecution or from evidence offered by the defendant." In that case it was held that it was not only incumbent on the defendant to make proof of the matter of excuse or extenuation, but that the proof must be by a preponderance of evidence sufficient to satisfy the jury of the fact, and that the accused was not entitled to a verdict, though there should be a reasonable doubt of the fact of extenuation Com. v. York was followed in Com. v. Webster, 5 Cush., 295. In both of these cases the opinion was delivered by Chief Justice Shaw. In a later case (Com. v. Hawkins, 3 Gray, 463), which was an indictment for murder, tried before the same chief justice and Justices Metcalf and Bigelow, the contention was that the offense was mitigated to manslaughter. The evidence was that the parties were under the influence of liquor, and after insulting words had fought with fists, and that while they were fighting the deceased was stabbed with a knife. All the evidence in the case was produced on the part of the Commonwealth. No evidence was offered on the part of the accused. The chief justice, at the close of the trial, remarked that the

doctrine of York's Case was that where the killing is proved to have been committed by the defendant, and nothing further is shown, the presumption of law is that it was malicious and an act of murder, and that this was inapplicable to the present case, where the circumstances attending the homicide were fully shown by the evidence. On this point the chief justice instructed the jury as follows: "The murder charged must be proved. The burden of proof is on the com-
54 monwealth to prove the case. All the evidence on both sides which the jury finds to be true is to be taken into consideration, and if, the homicide being conceded, no excuse or justification is shown, it is either murder or manslaughter; and if the jury, under all the circumstances, are satisfied beyond a reasonable doubt that it was done with malice, they will return a verdict of murder; otherwise, they will find the defendant guilty of manslaughter." It may be observed that there is, in substance and effect, little difference between the instructions of the Massachusetts court in the Hawkins Case and the charge of the judge in this case, taking the whole charge together—the instructions as to the burden of proof, and his directions with respect to the effect of reasonable doubt in the trial of a case. With respect to the conditions under which a homicide may be mitigated to manslaughter, on the contention that the act of killing was done in the heat of blood, or in a sudden transport of passion, the learned judge instructed the jury as follows: "The object of the law is to have passion controlled and subdued, and not permit it to become the excuse or palliation of crime. To mitigate the offense to manslaughter, the facts must show that the act was done in the excitement of passion; it must appear that the killing resulted from passion or heat of blood produced by a reasonable provocation. It is not every provocation that will reduce a killing from murder to manslaughter. The provocation must be of such a character, and so close upon the act of killing, that for the moment the prisoner could be considered as not master of his own understanding. If such an interval of time elapsed between the provocation and the act of killing as is reasonably sufficient for reason to resume its sway, the offense is not mitigated to manslaughter. I have said the provocation must be reasonable, and must be recent, and the act of killing must be done in a sudden transport of passion. Whether the provocation was reasonable, and whether sufficient time elapsed between the provocation given and the act of killing for the accused to subdue or control his passion, are questions of fact, to be determined by the jury on a consideration of the circumstances of the particular case before them." These instructions in all respects conform to legal rules and principles which apply to and control the issue involved in this branch of the case. 2 Rose. Cr. Ev., 772–781.

As the case stood when the State rested, the proof was of an arrest by a police officer on reasonable grounds, and the shooting by the accused in the effort to escape. On his examination as a witness, the prisoner testified that his object in going into the vestibule was an innocent object, and that he did not know that the deceased was an officer. The charge of the trial judge on this subject was as follows: "The prisoner contends here that the arrest was unlawful, and, if unlawful, it was the reasonable provocation of hot blood or sudden passion in the prisoner resisting the arrest; he having no notice of the official character of the deceased, and,

having no notice of it, he killed the deceased, and therefore his act of killing would be only manslaughter. If the arrest was unlawful in the sense I have defined (that is, that no crime had been committed by him, or that the officer had no reasonable cause to suspect him of being guilty of a crime), then it was unlawful; and if it was unlawful in this sense (that is, an arrest where no crime had been committed, or that the officer had no reasonable cause for it), and the defendant had no notice or knowledge of the official character of the person making the arrest, and thereupon, the arrest being made, hot blood or sudden passion was evolved or created in the mind of the defendant, and in that hot blood or sudden passion the shooting was done, the offense would be manslaughter only, and not murder of either degree. But the same questions of fact still remain: Was the arrest unlawful, or did the prisoner have notice of the official character of the person making the arrest? If the prisoner knew the person arresting him—knew him to be an officer—and he had committed a crime, which the officer had reasonable grounds to suspect him to be guilty of, the law does not permit the arrest to be a provocation sufficient to reduce the killing to manslaughter." These instructions are quite as favorable to the prisoner as he had any right to require. Nor has the prisoner any cause of complaint that he was not accorded by the trial judge the benefit of a reasonable doubt, to the full extent. Near the commencement of the charge the learned judge used this language: "In this case, once for all, you can remember it, and apply the principle as you go along in the investigation of the case, that the prisoner at the bar, when put upon his trial under this indictment, is presumed to be innocent, and his guilt, whatever phase it may take in your minds, whatever your conclusions from the facts may be, must be established in your mind and in your judgment beyond reasonable doubt, before you can convict. If, in this case, there should arise any reasonable doubt as to the guilt or innocence of the defendant generally upon this indictment, and under this evidence, your duty would be to acquit him of any offense. If, in considering this case, and applying the principles of law which will be given to you by the court, you should be clear, and find beyond reasonable doubt, that guilt has been established, but you should be in that state of mind which is called 'reasonable doubt' as to whether his guilt was that of manslaughter, or of murder of either of the degrees, the benefit of that reasonable doubt would go to the prisoner, and you would find him guilty of the lesser degree of homicide; that is, manslaughter. If it should be established to your minds beyond reasonable doubt that the defend-
55 ant was guilty of the offense of murder, and you should be in that state of reasonable doubt as to whether it is murder of the first degree or of the second degree, you would, under the law, be bound to convict of murder of the second degree only; and you would convict of murder of the first degree only when, under the law and under the facts, that degree is established beyond reasonable doubt." And in defining "reasonable doubt" the judge used the expression that: "It is the doubt which makes you hesitate as to the correctness of the conclusion which you reach. If, under your oaths and upon your consciences, after you have fully investigated the evidence, and compared it in all its parts, you say to yourself, 'I doubt if he is guilty,' then that is reasonable doubt. It is a doubt which settles in your judgment, and finds a resting place

there." The learned judge then closed his directions as to reasonable doubt in this emphatic language: "The benefit of the reasonable doubt always goes to the defendant, and always is applied in his favor. He is never presumed to be any more guilty than the facts make him, and your conclusion of guilt must be beyond reasonable doubt, in order to convict." The court, having instructed the jury upon the effect of reasonable doubt in language comprehending every issue in the case, was not obliged to reiterate it, and apply it specifically to every such issue. Warner v. State, 56 N. J. Law, 686–688; 29 Atl., 505. The charge of the court must be considered with reference to the case as it was made. The fair import of the judge's instruction, taken as a whole, is that the obligation rests primarily on the accused of proving such facts and circumstances as in law may justify the homicide, or mitigate the offense to manslaughter; submitting to the jury the issue of the guilt or innocence of the accused upon all the evidence in the case, and according to the accused the benefit of a reasonable doubt, which the learned judge declared "always goes to the defendant, and always is applied in his favor." The charge in these respects is sustained by the entire body of common-law precedents, and, I may add, by all the reported decisions in this State.

The other exceptions and assignments of error have been examined. Finding no error upon the record, the judgment should be affirmed.

Magie, C. J., and Dixon and Hendrickson, J. J., dissent.

Dixon, J. (dissenting): The plaintiff in error, having been convicted of murder in the first degree, contends that his constitutional rights were infringed by trying him before a struck jury; that is, a jury drawn from among the persons named on a panel selected by a judge, from which panel the State and the prisoner had struck an equal number of names. The constitutional prescriptions are these: "The right of trial by jury shall remain inviolate;" and, "in all criminal prosecutions the accused shall have the right to a speedy and public trial by an impartial jury." I have been unable to find any reason for thinking that the procedure mentioned runs counter to these constitutional injunctions. But, according to our statute, in cases tried before struck juries, accused persons are entitled to only 5 peremptory challenges, while at the time of the adoption of our constitution persons accused of certain high crimes (among them murder) were entitled to 20 peremptory challenges. This feature of the statute I deem unconstitutional. The right of the accused to challenge peremptorily, on being confronted with the proposed juror, immediately before the trial, I regard as a very important means of securing to him what the constitution guaranties—an impartial jury. The accused may know of a bias, the grounds of which he cannot prove or dare not disclose, or he may create a bias by an unsuccessful attempt to support a challenge for cause; and in any of these circumstances his sole resort is to a peremptory challenge. The evident utility and importance of this right, in order to insure the attainment of the constitutional aim—trial by an impartial jury—justify the conclusion that, so far as the right existed when the constitution was framed, it is within the guaranty of that instrument. And, if the right of peremptory challenge be thus guarantied at all, the most reasonable and the safest inference is that it is guarantied to the same extent as it then had. I am therefore of

opinion that a person on trial for any of these high crimes is entitled to 20 peremptory challenges, to be presented when the accused and the proposed juror are brought face to face, immediately before the trial. The present record, however, does not show that this right was denied to the plaintiff in error; for his specific objection was only to a struck jury, and every peremptory challenge interposed by him was allowed. On this ground a reversal of the judgment could scarcely be demanded. But I think there were, in the charge of the judge to the jury, errors which require reversal.

The undisputed facts established by the evidence were that the prisoner shot and killed Charles Gebhardt, in the city of Hoboken; that Gebhardt was a policeman of the city, and at the time of the homicide was arresting the prisoner without a warrant. The matters in dispute, on the evidence, were whether the prisoner had notice that Gebhardt, then in the dress of a private citizen, was a policeman; whether there existed any legal cause for the prisoner's arrest, and whether, when the prisoner fired the fatal shots, Gebhardt had a pistol aimed at the prisoner, as if about to shoot him. Under these circumstances, the judge instructed the jury as follows: "If you find that the act of killing Gebhardt was the act of the prisoner at the bar (and of that there is no dispute here; that fact is conceded by
56 the evidence, and by the counsel in the trial of the case), the presumption arises, notwithstanding the person slain was an officer of the law, and notwithstanding this killing grew out of an attempt to make an arrest, the killing having been established as that of the defendant, that the degree of the offense is murder of the second degree only. That presumption of law existing, the burden is then on the prisoner to mitigate that degree of guilt from murder of the second degree to manslaughter. That burden rests upon him to take the offense away from the effect of the presumption just stated, and by evidence reduce the killing to manslaughter. The killing being established, it is murder of the second degree, and, if the defendant desires to reduce it to a lower degree of homicide, he must establish that by the evidence, in your minds, to your satisfaction." The charge further declared as follows: "The burden of proof of self-defense is upon the prisoner. He must show to the satisfaction of the jury a situation and circumstances under which the right may be lawfully exercised, and, before his defense is complete, those facts and circumstances must appear to bring the act done by the prisoner within the prescribed limits." These instructions, I think, clearly deprived the prisoner of the benefit of the principle that an accused person shall not be convicted of any offense unless his guilt thereof be proved beyond reasonable doubt; for if the evidence raised in the minds of the jurors reasonable doubt whether the facts existed on which the homicide would be manslaughter only, but did not establish such facts in the minds of the jurors to their satisfaction, then, as between murder and manslaughter, the jury must, according to these instructions, convict the prisoner of murder; and if the evidence raised in their minds reasonable doubt whether the situation and circumstances were such as made the homicide excusable, because committed in self-defense, but did not show such situation and circumstances to the satisfaction of the jury, then, as between a conviction of murder and an acquittal on the ground

of self-defense, the jury must, according to these instructions, convict. Yet, in either of these conditions of proof, the jury would be convicting the prisoner of murder, when the whole evidence created in their minds reasonable doubt whether he was guilty of murder. Such a conviction would be in violation of the fundamental principle of our criminal jurisprudence. I think it plain that in this case there were, besides the killing, two principal matters, one or the other of which ought to have been established beyond reasonable doubt, in the minds of the jury, before they could properly convict the prisoner of murder. One of these matters was that Gebhardt's attempt to arrest the prisoner was legal. If that was shown beyond reasonable doubt, then the prisoner was proved to be guilty of murder. But certainly the legality of the arrest could not be assumed; and if it was not proved, the arrest should have been treated as any other unlawful interference with personal liberty—as an act which may be lawfully resisted. The other matter would present itself for consideration, if the evidence failed to prove beyond reasonable doubt the legality of the arrest, and was whether, in resisting the arrest, the prisoner resorted to malicious, wanton, or unreasonable violence; for if the prisoner in resisting the illegal arrest, was not shown beyond reasonable doubt to have acted maliciously or wantonly or unreasonably, then the homicide was not proved to have been criminal at all, and if he was not thus shown to have acted maliciously or wantonly, then the homicide was not proved to have been murder. Under the circumstances admitted at this trial, the mere killing did not, as matter of law, establish any criminality in the prisoner, and therefore did not cast upon him the burden of establishing any fact to the satisfaction of the jury in order to justify his acquittal. On the contrary, he was entitled to an acquittal, notwithstanding the killing, unless upon the circumstances touching the legality of the arrest, on the maliciousness, wantonness, or unreasonableness of the prisoner's conduct, the jury came to an undoubting conclusion adverse to his claims. The direction to the jury that they should convict the prisoner of murder, unless his claims on those points were substantiated to their satisfaction, was, in my opinion, erroneous. Although, in another part of the charge, the jury were told, in general terms, to give the prisoner the benefit of reasonable doubt, yet in the explicit directions above quoted this general instruction was practically withdrawn as to all contested questions, and the starting point for the deliberation of the jury was declared to be, not a presumption of his innocence, with the burden resting on the State to prove his guilt beyond reasonable doubt, but an assumption of the prisoner's guilt of murder, with the burden resting on him to establish to the satisfaction of the jury the illegality of his arrest, and such other facts as would mitigate the offense or excuse the homicide. So intelligible and so definite was the course which the learned judge thus marked out for the jury that I am unable to assure myself that the verdict of the jury does not rest upon this view of their duty, and therefore I conclude that the judgment should be reversed.

57 And which record, proceedings, and judgment aforesaid were afterwards, to wit, on the fifteenth day of November, A. D. 1898, being as yet of the term of September, A. D. 1898, by the Honorable Job H. Lippincott, justice of the supreme court of New Jersey, afore-

said, and the Honorable John A. Blair, judge of the court of common pleas of the county of Hudson, aforesaid, they being all of the judges composing and holding the court of oyer and terminer of the county of Hudson, aforesaid, certified to the judges of the court of errors and appeals in the last resort in all causes of the State of New Jersey, at Trenton, in a certain schedule annexed to a certain writ of error as they were of said day and year by said court of errors and appeals commanded.

And which said record, proceedings, and judgment were afterwards, to wit, on the twentieth day of March, A. D. 1899, being as yet of the term of December, A. D. 1898, remitted to the court of oyer and terminer of the county of Hudson, aforesaid, by remittitur from the court of errors and appeals of the State of New Jersey, aforesaid, dated the sixth day of March, A. D. 1899, and wherein it was considered and adjudged that the judgment aforesaid of the court of oyer and terminer of the county of Hudson, aforesaid, in the case of the State of New Jersey vs. James K. Brown, on indictment for murder, so as aforesaid removed by the writ of error aforesaid be affirmed with costs, and
58 that said record be remitted to the court of oyer and terminer of Hudson county, aforesaid, to be proceeded with in accordance with the said judgment and the practice of said court.

(Pro ut remittitur filed.)

And now at this twenty-fifth day of March, A. D. one thousand eight hundred and ninety-nine, being as yet of the December term, A. D. one thousand eight hundred and ninety-eight, the judgment heretofore entered against the said James K. Brown, defendant, as aforesaid, still remaining unsatisfied of record, and the said day named in said judgment, so as aforesaid heretofore fixed having heretofore expired and the court having considered the premises, and the defendant, James K. Brown, being again set to the bar, and it being again demanded of him, the said James K. Brown, if he hath or knoweth of anything to say whereof the court here ought not to proceed to designate a time for the execution of the said judgment against him, and he nothing further saith, the said court of oyer and terminer of the said county of Hudson do now appoint and designate Tuesday, the eighteenth day of April next, in the year of our Lord one thousand eight hundred and ninety-nine, as the day of the execution of the said judgment against the said James K. Brown, and the place provided by the sheriff of said county of Hudson according to law, as hereinbefore designated, as the place at which the said sheriff shall execute the sentence of death heretofore pronounced.

Therefore it is ordered and adjudged that the sheriff of said county of Hudson take the said James K. Brown from the bar of this court
59 to the jail of this county, whence he came, there to remain and be kept in close custody and confinement until Tuesday, the eighteenth day of April, A. D. one thousand eight hundred and ninety-nine, at which day, between the hours of ten o'clock in the forenoon and three o'clock in the afternoon of that same day, he, the said James K. Brown, be taken by the said sheriff of said county of Hudson to the place of execution provided by said sheriff according to law, and then and there the said James K. Brown be, by the said sheriff, hanged by the neck until dead.

Judgment, record of proceedings, and sentence signed this twenty-fifth day of March, A. D. one thousand eight hundred and ninety-nine.

JOB H. LIPPINCOTT,
Justice of the Supreme Court of New Jersey.

JOHN A. BLAIR,
Judge of the Court of Common Pleas in and for the County of Hudson, New Jersey.

60 STATE OF NEW JERSEY,
County of Hudson, ss:

I, John G. Fisher, clerk of the court of oyer and terminer of the county of Hudson, in the State of New Jersey, certify that the above and foregoing is a full, true, and complete transcript of the record and proceedings had and made in the case of the State of New Jersey against James K. Brown as fully as the same remains on file and of record in my office.

Witness my hand as such clerk and the seal of said court and county hereto affixed.

Done at the city of Jersey City this 26th day of April, eighteen hundred and ninety-nine.

[SEAL.] JOHN G. FISHER, *Clerk.*

61 (Indorsed:) Supreme Court of U. S., James K. Brown, pltff. in error, vs. The State of New Jersey, deft. in error. Statement of errors and parts of record. Wm. D. Daly, atty. of pltff. in error.

Service of within and copy thereof hereby acknowledged this 31st day of July, A. D. 1899.

JAMES S. ERWIN,
Prosecutor of the Pleas of Hudson Co., N. J., & Atty. of Defdt. in Error.

62 (Indorsed:) File No. 17400. Supreme Court U. S., October term, 1899. Term No. 290. James K. Brown, P. E., vs. The State of New Jersey. Statement of errors & designation by plaintiff in error of parts of record to be printed & proof of service. Filed Aug. 4, 1899.

63 Supreme Court of the United States, October term, 1899.

JAMES K. BROWN, PLTFF. IN ERROR,
vs.
THE STATE OF NEW JERSEY, DEFDT. IN ERROR. } On writ of error.

It is stipulated and agreed by the counsel of the respective parties in the above cause that the plaintiff in error shall file as a part of the statement of errors and parts of the record designated by plaintiff in error, and heretofore filed in this cause on the fourth day of August last, the annexed copy of certain assignments of error filed by plaintiff in error in the New Jersey court of errors and appeals, and with the note thereon as to the filing of common joinder in error; and that the said annexed copy of such assignments of error with said note of filing common joinder in error, shall be inserted after page 12 and following the certificate of the return by the judges of the court of oyer and terminer to the writ of error from the New Jersey court of errors and appeals.

And the defendant in error having been served with a copy of the

statement of errors on which plaintiff in error intends to rely, and of the parts of the record which plaintiff in error thinks necessary for the
64 consideration thereof, and defendant in error after examination of such parts of the record so designated, having concluded not to make any designation of additional parts of the record; it is further stipulated that the clerk shall print for the hearing of this cause the parts of the record heretofore designated by plaintiff in error and filed August fourth, eighteen hundred and ninety-nine, adding thereto as above stipulated the said annexed copy of certain assignments of error filed by plaintiff in error in the New Jersey court of errors and appeals with the note thereon as to the filing of common joinder in error in the last-named court.

Dated September 26th, 1899.

WM. D. DALY,
Counsel of Plaintiff in Error.
JAMES S. ERWIN,
Counsel of Defendant in Error.

65 New Jersey court of errors and appeals.

JAMES K. BROWN, PLTFF. IN ERROR,
vs.
THE STATE OF NEW JERSEY, DEFT. IN ERROR. } In error.

Assignment of errors.

Afterwards, that is to say, on the third Tuesday in November, A. D eighteen hundred and ninety-eight, before the justices of the court o errors and appeals of the State of New Jersey, comes the defendant, James K. Brown, by William D. Daly, his attorney, and says that in the record and proceedings aforesaid, and also in the matters recited and contained in the said bill of exceptions, and also in the giving of the verdict and judgment aforesaid, there is manifest error in this, to wit:

1. That the said court before whom, &c., at and upon the trial of said issue so joined between the State of New Jersey and the defendant aforesaid, refused to sustain the challenge to the array of the said jury, because said court granted a struck jury to try said cause without good grounds shown for the granting thereof.

2. That the said court before whom, &c., at and upon the trial of the said issue so joined between the parties aforesaid and against the objection of said defendant, refused to sustain the challenge to the array of the
66 said jury because the act under which such jury was drawn is in violation of the Constitution of the United States and the State of New Jersey.

3. That the said court before whom, &c., at and upon the trial of the issue so joined between the State of New Jersey and said defendant and against the objections of said defendant, refused to sustain the challenge to the array of the said jury on the ground that the panel of jurors so struck had not been returned by the sheriff into court, so that a jury might be therefrom chosen for the trial of said cause.

4. That the said court before whom, &c., at and upon the trial of the issue so joined between the State of New Jersey and the said defendant

and against the objections of the said defendant, did direct that the names of eighteen absent jurors be placed in the box and that a jury be drawn therefrom for the trial of said cause.

5. That the said court before whom, &c., at and upon the trial of the issue so joined between the State of New Jersey and the said defendant, and against the objections of said defendant, proceeded to the empanelling of a jury to try said cause in the absence of Percy Alberts, Jefferson McWilliams, Henry E. Collins, Frank D. Hunter, Edward J. Hudson, Abraham D. Runyon, Jacob Ringle, Charles M. Hall, James Potter, Benjamin G. De Mott, Harry H. Butts, Smith D. Mackey, David W. Lawrence, who were struck and drawn as part of the forty-eight jurors
67 from which a jury was to be empanelled to try said indictment, no sufficient cause being assigned for their absence or lawful excuse given why they should not appear.

6. That the said court before whom, &c., at and upon the trial of the issue so joined between the parties aforesaid and against the objections of said defendant, refused to sustain the challenge of said defendant to Edwin F. Manser, and permitted him to be sworn as juror to try said defendant contrary to the law of the land.

7. That the said court before whom, &c., at and upon the trial of the issue so joined between the parties aforesaid and against the objections of the said defendant, arbitrarily and of its own motion permitted said jury to be drawn in the absence of Percy Alberts, John K. Lawton, Edward S. Brown, William H. Furman, Jefferson McWilliams, Henry E. Collins, Frank D. Hunter, Edward J. Hudson, Abraham D. Runyon, Jacob Ringle, Charles M. Hall, James Potter, Benjamin G. De Mott, Harry H. Butts, Smith D. Mackey, and David W. Lawrence, who were struck as part of the forty-eight jurors to try said indictment, and were in fact drawn from the jury box to sit as jurors, or be examined as to their qualifications therefor.

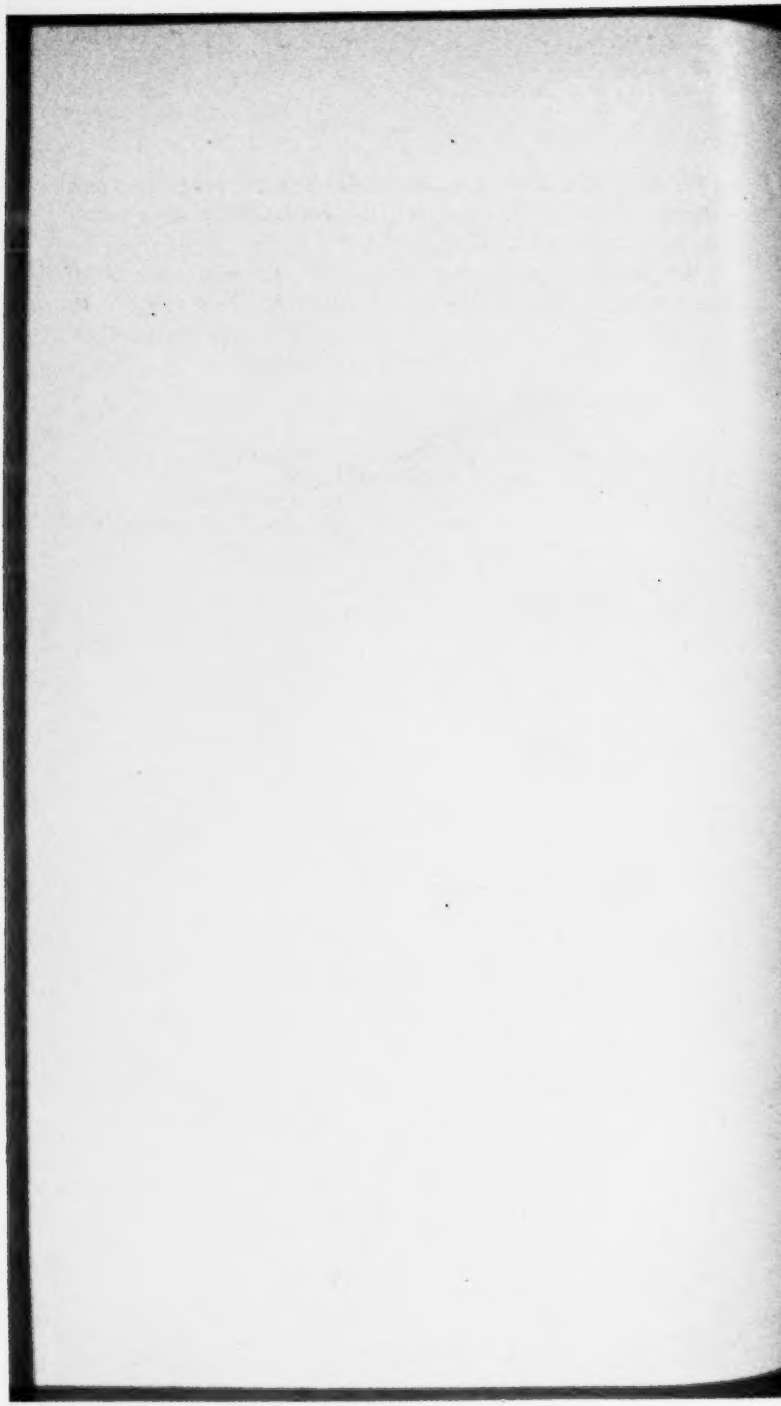
Therefore the said defendant, James K. Brown, prays that the judgment and conviction aforesaid by reason of the aforesaid errors and all other errors appearing in the record and proceedings aforesaid be reversed, annulled, and held for nothing, and that the said defendant, James K. Brown, as aforesaid, may be restored to all things he has lost on
68 occasion of said judgment and conviction, and that the said State of New Jersey may rejoin to said errors, etc.

WM. D. DALY,
Attorney for and of Counsel with the Defendant.

(To the assignment of errors as filed in the New Jersey court of errors and appeals, common joinder in error filed.)

69 (Indorsed:) Supreme Court of the United States. October term, 1899. James K. Brown, Pltff. in Error, vs. The State of New Jersey, Deft. in Error. On writ of error. Stipulation as to designation of record to be printed.

70 (Indorsed:) Case No. 17400. Supreme Court U. S. October term, 1899. Term No. 290. Jas. K. Brown, Plff. in Error, vs. The State of New Jersey. Stipulation as to printing parts of record. Filed Sept. 27, 1899.



No. 290.

Brief of Plaintiff in Error.

Supreme Court of the United States.

Filed Oct. 30, 1899.

JAMES K. BROWN,
Plaintiff in Error,

vs.

THE STATE OF NEW JERSEY,
Defendant in Error.

On Writ of Error to Hudson County, N. J., Oyer and Terminer.

BRIEF FOR PLAINTIFF IN ERROR.

WM. D. DALY,
Attorney and Counsel with Plaintiff in Error.

JOS. M. NOONAN,
Of Counsel with Plaintiff in Error.

NEW YORK:
APPEAL PRINTING CO., 14-16 VESEY STREET
Telephone, 192 Cortlandt.
1899.

IN THE

Supreme Court of the United States.

JAMES K. BROWN,
Plaintiff in Error,

vs.

THE STATE OF NEW JERSEY,
Defendant in Error.

Statement of the Case.

James K. Brown, the plaintiff in error, was indicted at the April Term, A. D. 1898, of the Hudson County, N. J., Court of Oyer and Terminer, for the murder of Charles Gebhardt on July twenty-sixth, 1898, and was tried by a struck jury and found guilty of murder in the first degree on October 5th, 1898, and was sentenced to be hanged.

The case was taken by writ of error to the New Jersey Court of Errors and Appeals and the judgment of the Court of Oyer and Terminer was by said Court of Errors and Appeals affirmed on March 6th, 1899, and the defendant was again

sentenced to be hanged. From the said judgment of the said Court of Errors and Appeals, affirming the said judgment of the Court of Oyer and Terminer, plaintiff in error now appeals to this Court.

It is contended by plaintiff in error that the said trial by a struck jury was in violation of Article 1, Section 7 of the Constitution of the State of New Jersey, and that by said trial he was denied the due process of law, and the equal protection of the laws guaranteed to him by the 14th amendment to the Constitution of the United States.

Brown was tried by a struck jury under the authority of Chapter 237 of the Laws of New Jersey of the year 1898. The pertinent sections of that act read as follows:

IV---Foreign and Struck Juries.

"Sec. 75. The Supreme Court, Court of Oyer and Terminer and Court of Quarter Sessions, respectively, or any judge thereof, may on motion in behalf of the State, or defendant in any indictment, order a jury to be struck for the trial thereof, and upon making said order the jury shall be struck, served and returned in the same manner as in case of struck juries ordered in the trial of civil causes, except as herein otherwise provided.

"Sec. 76. When a rule for a struck jury shall be entered in any criminal case, the Court granting such rule may, on motion of the prosecutor, or of the defendant, or on its own motion, select from the persons qualified to serve as jurors in and for

the County in which any indictment was found, whether the names of such persons appear on the sheriff's book of persons qualified to serve as jurors in and for such County or not, ninety-six names, with their places of abode, from which the prosecutor and the defendant shall each strike twenty-four names in the usual way, and the remaining forty-eight names shall be placed by the sheriff in the box in the presence of the Court, and from the names so placed in the box the jury shall be drawn in the usual way.

V---Challenges.

"Sec. 80. Every person who shall be indicted for treason, murder, misprision of treason, manslaughter, sodomy, rape, arson, burglary, robbery, forgery, perjury or subornation of perjury, and shall plead the plea of not guilty to such indictment, shall be permitted peremptorily to challenge twenty of the jury, and no more; and if any person, indicted as aforesaid, after having voluntarily and duly pleaded as aforesaid, shall peremptorily challenge a greater number of the jury than twenty, the Court shall disallow all such challenges over and above the said number of twenty; and the jury shall be charged and the trial shall proceed in like manner in all respects, and the like judgment shall be given as would or ought to be had and given if the person so indicted as aforesaid, and having pleaded as aforesaid, had not peremptorily challenged a greater number of the jury then in and by this act he or she is admitted to challenge; *provided*, this section shall not apply to struck or foreign juries.

"Sec. 81. Upon the trial of any indictment where twenty peremptory challenges are not allowed, the defendant or defendants and the Attorney-General or Prosecutor of the Pleas shall each be entitled to challenge peremptorily ten of the general panel of jurors summoned and returned by the Sheriff or other officer; and upon the trial of any indictment in cases where the defendant is entitled to twenty peremptory challenges the Attorney-General or Prosecutor of the Pleas shall be entitled to challenge peremptorily, and without assigning any cause, twelve of the jurors returned for the trial of such indictment, and upon the trial of any indictment for which a struck or foreign jury shall be summoned and returned, five peremptory challenges each shall be allowed to the defendant and to the State; challenges in all cases may be made at any time before the jury is sworn; all challenges to the array or to individual jurors, for any cause whatever, shall be triable by the Court."

I.

In England previous to the time of Henry VIII., a defendant indicted for any felony had a right to thirty-five peremptory challenges. By the Statute 22, Henry VIII. Cap. 14., the number of these peremptory challenges was reduced to twenty; and ten years later this statute was continued and made perpetual.

2 Hales Pleas 267d and 268, 1st Am. ed.

Viner, in his General Abridgment of Law and Equity (21 Vol., p. 300), says:

"The Attorney-General moved for leave to amend an information against defendant * * * and granted; and that the master might strike a jury by consent, which was also granted, being only a case of MISDEMEANOR, but NOT IN CAPITAL CASES, FOR THEN THE PRISONER WOULD LOSE HIS CHALLENGES."

Rex vs. Duncumb, 12 Mod., 224, Mich., 10 W., 3.

The same author (21 Vol. p. 301) says:

"On motion for a special jury, in the case of the King against Macartney, Trin. 2. Geo. 1, for the murder of the Duke of Hamilton, it was held by Parker, C J.: That THERE CANNOT BE A SPECIAL JURY IN CASES OF TREASON OR FELONY, for the party must have the advantage of challenging 20 in cases of felony, without cause shown. In cases of special juries, there are 48 brought before the Master, and he takes 24; so there cannot be a rule for a good jury, nor for a special jury, in this case of a trial at bar; and if there should be a special jury, it would take away the advantage the party has of challenging peremptorily. So no rule was made in this case."

In Rex vs. Edmonds, *et als* (4 Barn & Ald. and 6 Eng. Com. Law Reports, 564) the indictment was for conspiracy. The defendants were tried before a struck jury and convicted. A rule *nisi* having been obtained the conviction was affirmed. Chief Justice Abbott, in delivering the opinion of the Court, said:

"It cannot be, or at least it has not hitherto

been, ascertained, at what time the practice of apponting special (struck) juries at *nisi prius* first began. It probably arose out of the practice of appointing juries for trials at the bar of the Courts at Westminster, and was introduced for the better administration of justice and for securing the nomination of jurors duly qualified in all respects for their important office. It certainly prevailed long before the Statute 3. Geo. II., 25, and was recognized and declared by that statute WHICH REFERS TO THE FORMER PRACTICE. The whole matter is comprised in the fifteenth and two following sections of the statute."

The fifteenth section of this statute reads as follows:

"15. And, whereas, some doubt has been conceived touching the power of his Majesty's courts of law at Westminster to appoint juries to be struck before the Clerk of the Crown, Master of the Office, Prothonotaries, or other proper officers of such respective Courts, without the consent of the Prosecutor, or parties concerned in the prosecution or suit then depending, unless such issues are to be tried at the bar of the same Courts; be it declared and enacted by the authority aforesaid, That it shall and may be lawful to and for his Majesty's Courts of King's Bench, Common Pleas and Exchequer at Westminster respectively, upon motion made on behalf of his Majesty, his heirs or successors, or on the motion of any prosecutor or defendant in any indictment or information for any misdemeanor, or information in the nature of a *quo warranto*, depending,

or to be brought or prosecuted in the said Courts of King's Bench, or any information depending, or to be brought or prosecuted in the said Court of Exchequer, or on motion of any plaintiff or plaintiffs, defendant or defendants in any action, cause or suit whatsoever, depending, or to be brought and carried on in the said Courts of King's Bench, Common Pleas and Exchequer, or in any of them, and the said Courts are hereby respectively authorized and required, upon motion as aforesaid, in any of the cases before mentioned, to order and appoint a jury to be struck before the proper officer of each respective Court, for the trial of any issue joined, in any of the said cases, and triable by a jury of twelve men, in such manner as special juries have been, and are usually struck in such Courts respectively, upon trials at bar had in the said Courts, which said jury, so struck as aforesaid, shall be the jury returned for the trial of the said issue."

The sixteenth section provides that the person applying for the struck jury shall pay the fees for the striking, and the seventeenth section directs the Sheriff to produce his book or lists, etc.

The case of Rex vs. Edmonds was decided in the year 1820. The Statute 3. Geo. II., was enacted in the year 1731. It refers to and declares the former practice known to the law with respect to struck juries, and conclusively shows that practice to have been that struck juries were to be resorted to in trials of misdemeanors only or in informations in the nature of *quo warranto*.

When the Constitution of New Jersey was

adopted in 1776, a defendant on trial for murder, in that State, could be tried only by an ordinary jury of the country and was entitled to twenty peremptory challenges. That Constitution contained the following clause: "XXII. That the Common Law of England as well as so much of the statute law as has been heretofore practiced in this colony shall still remain in force until they shall be altered by a future law of the Legislature, such parts only excepted as are repugnant to the rights and privileges contained in this charter; and that the inestimable right of trial by jury shall remain confirmed as a part of the law of this colony without repeal forever." This surely means that the law governing and regulating the right of trial by jury in the State of New Jersey in 1776 should remain as a part of the law of New Jersey without repeal or impairment.

The Legislature of New Jersey in 1797 passed an act in relation to juries which provided, among other things, as follows:

"XIV. And be it enacted, That it shall and may be lawful for the Supreme Court, the Court of Common Pleas, and the Court of General Quarter Sessions of the Peace, respectively, on motion, in behalf of this State, or of any prosecutor or defendant in any indictment, or information in nature of a *quo warranto*, or on motion, in behalf of this State, or of any plaintiff, demandant, avowant, tenant or defendant, in any action or suit depending or to be depending before them, and triable by a jury of twelve men, to order a jury to be struck for the trial thereof; but this clause shall not extend to any indictment for any offence

where the party is entitled to challenge peremptory, or without cause shown."

In 1844 the present Constitution of the State was adopted in which it is provided that, "The "right of a trial by jury shall remain inviolate." In 1846 the Legislature of New Jersey passed another act in relation to juries, the pertinent parts of which read as follows:

"Sec. 15. It shall and may be lawful for the Supreme Court, Circuit Courts and Courts of Common Pleas, and the Courts of General Quarter Sessions of the Peace, respectively, on motion in behalf of this State or of any prosecutor or defendant in any indictment or information in nature of a *quo warranto*, or on motion on behalf of this State or of any plaintiff, demandant, avowant, tenant or defendant in any action or suit depending or to be depending before them and triable by a jury of twelve men, to order a jury to be struck for the trial thereof, BUT THIS CLAUSE SHALL NOT EXTEND TO ANY INDICTMENT FOR ANY OFFENSE WHERE THE PARTY IS ENTITLED TO CHALLENGE PEREMPTORILY OR WITHOUT CAUSE SHOWN under the Act entitled 'An Act regulating proceedings and trials in criminal cases.'"

"Sec. 16. It shall and may be lawful for the Court of Oyer and Terminer and General Gaol Delivery, on motion in behalf of this State or of any defendant in any indictment or presentment, depending, or to be depending, before them and triable by a jury of twelve men, WHEREIN THE DEFENDANT IS NOT BY LAW ENTITLED TO

CHALLENGE PEREMPTORILY OR WITHOUT CAUSE SHOWN AS SPECIFIED IN THE PRECEDING SECTION, to order a jury to be struck for the trial thereof; which jury shall be struck before one of the Justices of the Supreme Court, in the same manner and upon the same terms as are, or may be, prescribed by law in other cases, and shall be convened by process of *venire facias* issued out of the said Court of Oyer and Terminer and General Gaol Delivery."

The Act of 1846, entitled "An Act regulating proceedings in trials in criminal cases," to which the act just quoted refers, provides with respect to peremptory challenges as follows:

"Sec. 6. Every person who shall be indicted for treason, MURDER, or other crime punishable with death, or for misprision of treason, manslaughter, sodomy, rape, arson, burglary, robbery, forgery, perjury or subornation of perjury, and shall voluntarily and duly plead the plea of not guilty to such indictment, shall be admitted peremptorily to challenge twenty of the jury, and no more; and if any person indicted as aforesaid, without having voluntarily and duly pleaded as aforesaid, shall peremptorily challenge a greater number of the jury than twenty, the Court shall disallow all such challenges over and above the said number of twenty; and the jury shall be charged and the trial shall proceed in like manner in all respects, and the like judgment shall be given, as would or ought to be given if the person so indicted as aforesaid, and having pleaded as aforesaid, had not peremptorily challenged a greater number of the

jury than in and by this act he or she is admitted to challenge."

"Sec. 7. Neither the Attorney-General nor any other person prosecuting for or in behalf of this State shall be admitted in any case to challenge any juror without assigning a cause certain to be tried and approved by the Court; and, further, the privilege of such peremptory challenges shall not be allowed to offenders in any cases but such as are specified in the section immediately preceding."

In 1874 the Legislature of New Jersey passed an act extending trial by struck juries to all criminal cases, and allowed but three peremptory challenges to the defense. In 1898 the act now in force and above quoted was passed.

Specification of Errors.

The judgment of the Court of Errors and Appeals of New Jersey, brought up for review by the writ of error in this case, is fatally erroneous:

1st. Because it affirmed the judgment of the Court of Oyer and Terminer of Hudson County, N. J., in which said last-mentioned Court the plaintiff in error was denied at his trial the due process of law guaranteed to him by the 14th Amendment to the Constitution of the United States, in this: That, at the time of his said trial, he was, by the Constitution and law of the State of New Jersey, entitled to be tried by an ordinary jury of the country, and to be admitted

to twenty peremptory challenges, whereas, contrary to the Constitution and law of New Jersey, he was denied his right to be tried by an ordinary jury of the country, and was denied his right to be admitted to 20 peremptory challenges, and was, against his objection, and contrary to the Constitution and law of New Jersey, tried by a struck jury, and restricted to five peremptory challenges.

2d. Because it affirmed the judgment of said Oyer and Terminer, in which said Court the plaintiff in error was denied at his said trial the equal protection of the laws guaranteed to him by the 14th Amendment to the Constitution of the United States, in this: That a defendant, being on trial for the offense of murder in the State of New Jersey at the time that the plaintiff in error was so tried would, under the Constitution and law of New Jersey, be entitled to be tried by an ordinary jury of the country and to be admitted to 20 peremptory challenges, whereas, contrary to the Constitution and law of New Jersey he was against his objection tried by a struck jury and restricted to five peremptory challenges; and further that there being a pretended statute of the State of New Jersey purporting to authorize trial by struck jury in a capital case and restricting a defendant so tried to five peremptory challenges, and providing that a defendant might be so tried on an order of the Court for such struck jury on the application of the public prosecutor, and there being thus recognized in New Jersey two distinct methods of trial, one much more advantageous to a defendant than the other, the plaintiff in error was against his ob-

jection and contrary to the Constitution and law of New Jersey tried by the method less advantageous to him, and was denied the equal protection of the law which, in his circumstances, should under the Constitution and law of New Jersey have been accorded to him.

3d. Because it affirmed the judgment of said Oyer and Terminer in which said Court plaintiff in error was at his said trial denied his right to be tried by an impartial jury as guaranteed to him by the Constitution of the United States and the Constitution of New Jersey, is this, that the jurors who tried said plaintiff in error were not selected, summoned, returned and impanelled in accordance with the constitution and law of New Jersey, or of any valid statute of New Jersey, but were, contrary to the constitution and law of New Jersey, nominated and selected by the Court to be returned as part of the special panel to try said case.

4th. Because it denied to the plaintiff in error the due process of law guaranteed to him by the 14th Amendment to the Constitution of the United States, inasmuch as it sustained his conviction without such due process of law.

5th. Because it denied to the plaintiff in error the equal protection of the laws guaranteed to him by said 14th amendment, inasmuch as it sustained his conviction by a struck jury.

BRIEF OF THE ARGUMENT.

As to the Right and Duty of this Court to consider this Appeal.

In Hodgson vs. Vermont, 168 U. S., 262, this Court said: "That by the 14th amendment it was "made the right and the consequent duty of this "Court when a case has been duly brought before "it to inquire whether, in the enactment and ad- "ministration of the criminal laws of the State it "is sought to arbitrarily deprive any person of his "life, liberty or property, or to refuse him equal "protection of the laws, and that such inquiry is "not precluded or ended by the mere fact that the "judgment complained of was reached by pro- "ceedings in a State Court in pursuance of a "State statute."

In Allen vs. Georgia, 166 U. S., 138, this Court said: "To justify any interference on our part it "is necessary to show that the course pursued has "deprived, or will deprive, the plaintiff in error of "his life, liberty or property without due process "of law." The course pursued in the case at bar, we expect to show, has already deprived the plaintiff in error of his liberty without due process of law, and will, unless this Court intervenes, deprive him of his life without due process of law.

In the last cited case this Court said: "With- "out attempting to define exactly in what due "process of law consists, it is sufficient to say that "if the Supreme Court of the State has acted in "consonance with the constitutional laws of the "State and its own procedure it should only be in "very exceptional circumstances that this Court

"would feel justified in saying that there had been "a failure of due legal process."

We contend that in this case the Court of Errors and Appeals of New Jersey has not acted in consonance with the constitutional laws of that State. We contend further that this case is one of very exceptional circumstances. Addressing ourselves to the action of the New Jersey Court of Errors and Appeals we ask how it is to be ascertained whether or not that court has acted in consonance with the constitutional laws of the State? Will this Court inquire? Or will this Court accept the assertion of the State court for the fact? The highest Court of a State will always act in consonance with laws which it declares or assumes to be constitutional. It would be a moral impossibility —something altogether inconceivable—for the highest Court of a State to act in consonance with laws which at the same time it should declare or concede to be unconstitutional. If this Court would feel justified in saying that there had been a failure of due legal process provided the court below had not acted in consonance with the constitutional laws of New Jersey then there would seem to be cast upon this court the duty and obligation of inquiring and ascertaining whether the State Court has or has not acted in consonance with the constitutional laws of the State. That this Court has done this in certain cases affecting property is well known. In Chicago, B. & Q. Rd. Co. vs. Chicago, 166 U. S., 226, this Court held that "A judgment of a "State Court, even if it be authorized by statute,

"whereby private property is taken for the State "or under its direction for public use, without "compensation made or secured to the owner, is, "upon principle and authority, wanting in the due "process of law required by the 14th amendment "to the Constitution of the United States, and the "affirmance of such judgment by the highest Court "of the State is a denial by that State of a right "secured to the owner by that instrument."

Unless private property is to be deemed more sacred than human life, the reasoning which would justify this Court in inquiring and determining whether a judgment of the highest Court of the State in a case concerning property is a denial of due process of law would equally justify this Court in making a similar inquiry and determination in a case involving a man's life. Hence we take it to be clearly the right and duty of this Court to consider and determine the questions brought before it on this writ of error.

What is Due Process?

We allege that the procedure provided by the statute of New Jersey for trial by a struck jury in a murder case is not due process of law. And this brings us to the question, what is due process of law as used in the 14th amendment? There have been many definitions of the term, most of which have not been conspicuously felicitous.

In *Walker vs. Sauvinet* (*92 U. S., 90*), it was said: "A State cannot deprive a person of his property without due process at law. * * * This process in the states is regulated by the law

of the state." This cannot mean that that process of law of a state which is due process of law is regulated by the law of the state; for such a statement would be a mere truism. Yet manifestly, on the other hand, due process of law cannot be taken to mean any process of law which may be prescribed or regulated by the law of the State. For if any process of law which may be prescribed or regulated by the law of a State is, *ipso facto*, due process of law, then there would be no meaning to the clause of the Federal Constitution inhibiting a state from depriving a person of life, liberty or property without due process of law. A State, *qua State*, can deprive a person of life, liberty or property without due process of law only when the State by its legislative action creates some process of law which is not due process of law and which is enforced so as to deprive or seek to deprive some person of his life, liberty or property. If the Governor of New Jersey should take a man out of jail, who was there awaiting trial, and should hang him, the man so hanged would undoubtedly be deprived of life without due process of law. But in such a case it would not be the State that deprived the man of life without due process of law. The deprivation would have been effected, not by the State nor under its authority, but by the lawless and criminal act of the Governor. And the act of the Governor, contrary to and in defiance of the law of the State, would not come within the clause of the Federal Constitution inhibiting a State from depriving any person of life, liberty or property without due process of law.

Nor can due process of law be taken to mean any process of law, which, although prescribed or regulated by the law of the State, is contrary to some provision of the Constitution of the United States other than that clause which inhibits a State from depriving any person of life, liberty or property without due process of law. For then this latter clause would be simply equivalent to a declaration that no State should deprive a person of life, liberty or property contrary to the Constitution of the United States, and would be wholly superfluous.

In *Murray vs. Land & I. Co.* (18 How., 272), Mr. Justice Curtis insisted that "due process of law must mean something more than the actual existing law of the land" (or of the State) "for otherwise the clause would be no restraint upon legislation." His view was, however, discredited in *Hutardo vs. California* (110 U. S., 516), and the doctrine of Walker vs. Sauvinet was approved. In the Hutardo case the Court said that due process of law "refers to that law of the land in each State which derives its authority from the inherent and reserved powers of the State exerted within the limits of those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions." This definition, to be of any practical value, needs at least two other definitions to explain it. What are the "fundamental principles of liberty and justice which lie at the base of all our civil and political institutions"? And what are "the limits of those fundamental principles"? The definition by Chancellor Kent has been extensively quoted. He

gravely declared that "the better and larger definition of due process of law is that it means law in its regular course of administration through Courts of justice." This reminds one of Polonius' definition of madness:

"For, to define true madness, what is't but to be nothing else but mad."

Indubitably!

Coke in his commentary on Magna Carta, Cap. 29, says that *lex terrae* is declared by 37 Edward III to mean due process of law; and Coke adds that due process of law means process "according to the old law of the land."

I. Chief Justice Shaw, in Jones vs. Robbins (8 Gray, 329), said: "These terms—due process of law and law of the land—cannot, we think, be used in their most bold and literal sense to mean the law of the land at the time of their (the defendants') trial, because the laws may be shaped and altered by the Legislature from time to time; and such a provision, intended to prohibit the making of any law, impairing the ancient rights and liberties of the subject, would, under such a construction, be wholly nugatory and void. The Legislature might simply change the law by statute, and thus remove the landmark and the barrier intended to be set up by this provision in the Bill of Rights. It must, therefore, have intended the ancient established law and course of legal proceedings, by an adherence to which our ancestors in England, before the settlement of this country, and the emigrants themselves and their descendants, had found safety for their personal rights."

In Hovey vs. Elliott, 167 U. S., 409, Mr. Storey is quoted with approval where, speaking of the "due process of law" of the 5th amendment, he says. "That this clause in effect affirms the right "of trial according to the process and proceedings "of the common law." If "due process of law" means, in the 5th amendment, the right of trial according to the process and proceedings of the common law, why should not the same words in the 14th amendment mean the same thing? But, whatever may be the precise definition of "due process of law" as used in the 14th amendment a process created by a statute of a State in controvention of the constitution of that State cannot be due process of law.

The Legislation of 1898, in New Jersey, violates the Constitution of that State.

We very respectfully insist that the law of New Jersey authorizing trial by struck juries in capital cases violates Article I, Paragraph 7, of the Constitution of New Jersey. What is meant by "trial by jury?" In Thompson vs. Utah, 170 U. S., 341, this Court said: "It must consequently be "taken that the words 'jury' and the words 'trial "by jury' were placed in the Constitution of the "United States with reference to the meaning "affixed to them in the law as it was in this "country and in England at the time of the adop-"tion of that instrument."

In Callan vs. Wilson, 127 U. S., 540, this Court said that "The guarantee of a trial by jury in the "third article implied a trial in that mode and ac-

"cording to the settled rules of the common law."

In U. S. vs. Wong Kim Ark, 169 U. S. 649, this Court said: "In construing any act of legislation "whether a statute enacted by the legislature or "constitution established by the people as the "supreme law of the land, regard is to be had, not "only to all parts of the act itself, but also to the "condition and to the history of the law as "previously existing, and in the light of which the "new act must be read and interpreted."

Chief Justice Fuller in the last cited case used this language: "Obviously where the constitution "deals with common law rights and uses common "law phraseology its language should be read in "the light of the common law."

The Court of Errors and Appeals and the Supreme Court of New Jersey have repeatedly defined the meaning of trial by jury as used in the Constitution of 1776 and in the Constitution of 1844. We respectfully refer to some of these definitions.

In Johnson vs. Barclay, 1 Harr. 1, the Court said speaking of the Constitution of 1776, that by that instrument trial by jury "was adopted or rather continued as it was then used in England and in this Colony."

In Howe vs. Treasurer of Plainfield, 8th Vr. 145, the Court quoted with approval the language of Mr. Justice Strong in a Pennsylvania case where he said speaking of the right of trial by jury, "It is the old "right, whatever it was, that we previously en- "joyed, that must remain inviolate alike in its "mode of enjoyment and in its extent." * * * "It was a right—the title of which was founded

"upon usage—and its measure is, therefore, to be "sought in the usage which prevailed at the time "when it was asserted."

In Coykendall vs. Robinson, 10th Vr., 28, the Court said, speaking of the Constitution of 1844, that by that instrument "jury trial is preserved "and upheld inviolate as it existed when the Con- "stitution was adopted."

Suppose one were called upon to give an account of jury trial as it existed when the New Jersey Constitution of 1844 was adopted, what would he have to say about jury trials in murder cases? He would have to say that by the common law of England from time immemorial, and by the statute of George II, every man tried for murder was tried by an ordinary jury and that in such a case a struck jury was expressly prohibited. He would have to say that we inherited the law of England in this respect; that New Jersey solemnly adopted it in her first Constitution; that she embodied it in legislation in 1797; and in 1844 again solemnly adopted it in her second and present Constitution; that two years later she again embodied it in an act of legislation and that it continued to be the law until 1874. If, then, jury trial is preserved and upheld inviolate by the Constitution of 1844, as such trial existed when that constitution was adopted, it would seem to be quite manifest that trial by a struck jury in a murder case, which was an unlawful method of trial in such a case at the time of the adoption of the constitution, must still in such a case be an unlawful method of trial in New Jersey.

In Carter Bros. vs. Camden District Court, 20 Vroom, 600, the Court said, speaking of the Constitution of 1776, that "It does not enlarge but "merely secures the right (of trial by jury) as it "then existed." The Court added, "Neither does "the Constitution of 1844 enlarge the right. "The language of that instrument is, 'The right "of trial by jury shall remain inviolate.' The "meaning of the language is that where the right "to a jury existed before the Constitution it could "not be taken away by the Legislature." This clearly does not mean that the right could be satisfied by the awarding of any kind of a jury, but that it could only be satisfied and must be satisfied by the awarding of such a jury as would under the law at the time of the adoption of the Constitution be competent to sit in such a case.

The Court of Errors and Appeals of New Jersey in Edwards vs. Elliott, 7th Vr., 449, said: "This "right of trial by jury in civil causes"—and, *a fortiori*, in criminal cases—"as commonly under-"stood and as construed in our Courts is the right "to have all such causes heard before a jury of "twelve men according to the usual process "and practice of the Courts of common law." But now it is ruled that this right of trial by jury in capital cases is not the right to have such cases heard before a jury of twelve men according to the usual process and practice of the Courts of common law. Now, it is ruled that this right of trial by jury in capital cases is not violated by the denial of the existence of a right to have such cases heard before a jury of twelve men according to the usual process and practice of the Courts of com-

mon law. Now, it is ruled that the right of trial by jury in capital cases is preserved inviolate by a trial before a struck jury, which method of trial, according to the usual and invariable process and practice of the Courts of common law, could not be resorted to in such cases. The interdiction of trial before a struck jury in a capital case was absolute in England and in New Jersey in 1776. Trial by a struck jury in such a case was then as illegal in England and in New Jersey as trial by a jury of matrons or by a coroner's jury or by a jury of the grand assise would then have been in such a case. Now, if the Constitution of 1844, which preserved the guarantee of trial by jury in the Constitution of 1776, can be interpreted to permit trial before a struck jury in a capital case, why may it not be interpreted to permit trial before a jury of matrons or before a coroner's jury or before a jury of the grand assise in such a case? The difficulty is not met by saying that trial before a jury of matrons or before a coroner's jury or before a jury of the grand assise was unknown in 1776 and in 1844 in criminal cases. Such juries were no more unknown in 1776 and 1844 in criminal cases than struck juries were unknown in 1776 and 1844 in capital cases.

In the case of the American Saw Company vs. First National Bank, 29th Vroom, 438, the Supreme Court of New Jersey said: "A trial by "jury in this Commonwealth is such a one as in all "matters of substance accords, in this particular, "with the practice of the common law; and as- "suredly no instance can be found in which under "that system a jury ever sat to review the decision

"of a referee on the question whether a forgery or "similar tort had been committed." And equally assuredly, no instance can be found in which under that system a struck jury every sat to try a man for murder. The same Court in the same case also said: "The addition of such a factor"—meaning the submission of a referee's report to a jury as *prima facie* proof of the matters therein stated—"would materially change the nature of a "trial by jury considered as a common law institu- "tion and on that account in view of the constitu- "tion of the State its introduction would not be "within the power of legislation."

Does not trial under the New Jersey statute, by a struck jury in a capital case materially change the nature of the trial by jury in such a case at common law, and as it existed at the time of the adoption of the present Constitution of New Jersey? If so, "its introduction would not be within the "power of the legislation."

The Court of Chancery of New Jersey said in 1832, in the case of Scudder vs. Trenton Del. Falls Co., 1 Saxton, 694: "The Constitution (of 1776) "provides that the common law of England, as "well as so much of the statute law as have here- "tofore been practiced in this State shall remain "in force until altered, &c.; and that the in- "estimable right of trial by jury shall remain "confirmed as a part of the law of this State with- "out repeal forever. It is unnecessary to inquire "into the origin of the trial by jury or how far or "to what particular cases it has been extended in "England. How it was exercised in the colony at "the time of adopting the Constitution is a more

"important inquiry. It was a part of the common "law so far as that had been adopted or acted on "here at that time; so far it (the common law) was "to remain the law of the State until altered, but "that part of it (*i. e.*, that part of the common "law) relating to trial by jury was to remain with- "out repeal. It was to remain as it had thereto- "fore been in use." Can it be said that the right of trial by jury remains as it had theretofore been in use when a defendant on trial for his life can be tried by a jury of a kind which at common law was unknown in such a case?

Judge Cooley in his great work on Constitutional Limitations, page 390, says: "Accusations of "criminal conduct are tried at the common law by "jury; and wherever the right to this trial is "guaranteed by the Constitution without qualifi- "cation or restriction, it must be understood as re- "tained in all those cases which were triable by "jury at the common law, and with all the com- "mon law incidents to a jury trial so far, at least, "as they can be regarded as tending to the protec- "tion of the accused." This Court in Hayes vs. Missouri, 120 U. S., 68, declared that "the per- "emptory challenge" is "one of the most effective "means" of protecting the accused. Coke, 3 Ins., 27, calls the peremptory challenge, "a principal "matter concerning the trial."

A defendant on trial before a struck jury in a capital case is deprived of 15 of the peremptory challenges to which he would be entitled before an ordinary jury.

Judge Cooley in his above cited work, page 506, says: "The Constitutional provisions (as to the

"right of trial by jury) do not extend the right. "They only secure it in the cases in which it was "a matter of right before. But in doing this they "preserved the historical jury of twelve men with "all its incidents unless a contrary purpose clearly "appeared."

Proffat, in his work on "Trial by Jury," commenting on Cooley's text, says (Section 84): "No matter how expressed, whether 'shall be inviolate,' or 'shall remain inviolate,' there is a reference to the mode and nature of the trial as known and used at the time of the constitutional provision."

Mr. Bishop, in his work on Criminal Procedure, Sections 892, says: "Where the (Constitutional) provision is simply, as in some States, that the right of jury trial shall REMAIN INVIOLATE, the construction is the same; namely, that it secures such trial as, AND ONLY AS, it existed in the State when the Constitution was adopted."

In the case of the State vs. Fowler, 29 Vroom, 423, where the charge was conspiracy, the late Chief Justice Beasley, in delivering the opinion of the Supreme Court of New Jersey, said:

"Sundry exceptions were taken to the course of law pursued at the trial, which will be briefly noticed seriatim.

"The first of these contentions was that the jury that had been struck was unconstitutional, inasmuch as the fundamental law, which declares that 'the right of a trial by jury shall remain inviolate,' calls for an ordinary jury and not for a special one.

"The obvious answer to this objection is that the trial by a struck jury was part of the system of legal procedure derived by the people of this State from the English law, and that it was confirmed and regulated by legislation in this Commonwealth as early as the year 1797 (Pat. L.), which was forty-seven years before the Constitution of 1844 was established. The Constitutional mandate referred to, THEREFORE, did nothing more than to ratify and perpetuate the right of trial by jury as, in substance, it then existed."

It is true that "the trial by a struck jury was part of the system of legal procedure derived by the people of this State from the English law." It is true that the trial by a struck jury, "was confirmed and regulated by legislation in this Commonwealth as early as the year 1797." But it is equally true that "the trial by a struck jury was part of the system of legal procedure derived by the people of this State from the English law" for the trial, in criminal cases, of misdemeanors only. It is equally true that the trial by a struck jury "was confirmed and regulated by legislation in this Commonwealth as early as the year 1797," for the trial, in criminal cases, of misdemeanors only. While the Chief Justice was right in sustaining the conviction by a struck jury in the case before him, which was a mere misdemeanor at common law, it was most unfortunate that he should have used language so broad and so unqualified as to create the impression that he meant to affirm the constitutionality of trial by a struck jury in all criminal cases. His dictum has led to much hanging that might better have

been left undone and has now produced a judicial opinion that may be respectfully described as distinctly *sui generis*.

But, after all, the most important thing for our purpose in the Fowler case is the declaration of the Chief Justice that "the constitutional mandate referred to (the provision of the Constitution of 1844 as to the right of trial by jury) did nothing more than to ratify and perpetuate the right of trial by jury as, in substance, it then existed." To say that the mandate "did nothing more than to ratify and perpetuate," &c., does not mean that the mandate may have done something less "than to ratify and perpetuate," &c., but means that the precise and only thing which the mandate did was "to ratify and perpetuate the right of trial by jury as, in substance, it then existed." Had the Fowler case been a murder case, and had the Chief Justice investigated the history of the law relating to the trial of such a case, he certainly would not have said that "the trial by a struck jury" in such a case "was part of the system of legal procedure derived by the people of this State from the English law, and that it was confirmed and regulated" in such a case "by legislation in this Commonwealth as early as the year 1797." Is the right of a defendant, on trial for murder, to the number of peremptory challenges allowed to him by the common law of England and by the statute law of New Jersey at the time of the adoption of the Constitution a matter of "substance"? If it is, then that right, according to Beasley, is ratified and perpetuated by the Constitution. Coke says (3 Ins., 27) of the peremptory challenge that "the end of challenge

is to have an indifferent trial and which is required by law; and to bar the party indicted of his lawful challenge is to bar him of *a principal matter* concerning his trial." Surely, "a principal matter" must be a matter of substance!

Ever since the decision in the Fowler case it has been taken for granted by the bench and the bar that the constitutionality of trial by struck juries was established in all criminal cases. Since then many defendants charged with murder have been tried and convicted by struck juries, and, on appeal to the Court of Errors and Appeals, such convictions have been sustained. In none of these cases was any question raised as to the constitutionality of such a method of trial, although in some of them the record disclosed the fact that the defendant had been tried by a struck jury. The affirmance of the judgments in those cases was therefore equivalent to the affirmance of the constitutionality of trial by a struck jury in a capital case. This was the legal situation which existed when the constitutionality of such a method of trial in such a case was for the first time distinctly raised before the Court of Errors and Appeals of New Jersey in the case at bar. The opinion of that Court delivered by Mr. Justice Depew, and now before this Court, states the grounds upon which it sustained the constitutionality of such a method of trial in such a case.

The Opinion of the Court.

The fundamental infirmity of the Court's reasoning arises from its extraordinary misconception of the historical development of English law.

The Court, in its opinion, commits itself to such astonishing and untenable propositions as these: that Magna Charta "occupies, in the Constitutional Law of England, the place of our written Constitutions, Federal and State;" that any Act of Parliament contrary to Magna Charta is as completely invalid as Acts of the Legislature are which contravene constitutional limitations; that it is competent for an English Court to express "a scruple" with respect to the validity of an Act of Parliament; that some matters appertaining to English law are beyond the control of Parliament; that Parliament is "permitted" to exercise control over certain other matters appertaining to English law; that trial by jury is of great antiquity; that King Alfred employed trial by jury; "that to King Alfred the world is indebted for the "unanimous duodecemiral judgment;" that trial by jury existed in England before the Conquest; that the possessory assizes of Henry II. were employed "sometimes" on questions of property, but "more frequently on matters of a criminal nature;" "that before Magna Charta trial by jury was a trial before a tribunal established for the determination of matters of fact, consisting of twelve men, whose decision could only be by the consent of all;" that "the words 'trial by jury' had a definite and fixed meaning at the time of Magna Charta, as well settled as any other term known to the common law;" that the *judicium parium* of Magna Charta means trial by jury; that "the qualification of jurors, and the means by which they were to be selected and empaneled, constituted no part of the essential features of trial by

jury at common law;" that Magna Charta guaranteed trial by jury; that Magna Charta is not an Act of Parliament; that certain details of trial by jury could have been "fixed in the constitution of England unalterably" if it had been desirable to do so; that England has a constitution which is susceptible of having provisions consciously inserted, incorporated or fixed in it; that by the common law from time immemorial before Magna Charta thirty-five peremptory challenges were allowed the accused in treason or felony.

These extraordinary dicta represent in part ideas in the domain of legal history that had probably never before been seriously advanced, and in part ideas that were generally entertained some years ago, but which the acumen of modern critical scholarship has long since demonstrated to be false. Judge Depue begins his historical disquisition by declaring that "trial by jury, as the means of determining questions of fact, is of great antiquity." He says: "In the Mirror of Justice satisfactory evidence is furnished that in criminal cases in the time of King Alfred trial by jury was trial by a jury of twelve men, who were sworn, and whose verdict was required to be by the concurrence of all." What Justice Depue understands the Mirror of Justice to say about trial by jury in King Alfred's time must not be taken too seriously, especially when one reflects that when the Mirror was compiled trial by jury—the thing we know as trial by jury—had no existence.

Professor E. Robertson in Article Jury in Encyclopædia Britannica says of trial by jury: "Until

quite recently this, like all other institutions, was popularly regarded as the work of a single legislator, and in England it is one of the achievements usually assigned to Alfred. It is needless to say that there is no historical foundation whatever for such a supposition."

Freeman, a scholar of æcumenical fame in the domain of English legal history, says:

"At this time of day no one need waste his time in proving that trial by jury was not invented by Alfred. * * * If by trial by jury we mean any kind of trial in which the case is decided by the oaths of men taken from among the community at large, then trial by jury is as old as any institution of the Teutonic race. If by trial by jury we mean a form of trial in which, while the royal judge lays down the law, a sworn body of men from among the community decides all questions of fact—still more, if we understand a form of trial on which the jurors cannot be called in question for any verdict which they may give—then trial by jury is a very modern thing indeed. In this form it cannot be said to be older than the time of Charles the Second."

The historical inaccuracy of the statement that trial by jury existed in the time of Alfred is unconsciously exposed by Judge Depue himself, where, in his opinion, he quotes Mr. Finalson as saying in a note to Reeve's English Law:

"It is certain that in Alfred's time there was trial by jury in criminal cases, and equally certain that jurors in those days were witnesses." One might well answer that if the jurors in those days

were witnesses then in those days there was no such thing as trial by jury. For as Freeman remarks "it is the essence" of trial by jury that the jurors "should not use their personal knowledge but should give their verdict according to the evidence laid before them by others."

Judge Depue, in support of the antiquity of a mode of trial which he erroneously conceives to have been trial by jury, quotes Coke as saying, of trial by jury: *"This trial of the fact is very ancient and was the law before the conquest. "The reference is 1 Co. Litt 155 b. On turning to Coke's text it will be found that Coke is not speaking of trial by jury at all but of trial by recognitors and that his language has been misquoted.

What Coke here says is: "This trial of the fact *per duodecem liberos et legales homines* is very ancient; for hear what the law was before the conquest: *In sengulis centuriis comitia sunto, atque liberae conditionis viri duodeni,*" &c. This is the law of Aethelred which established an accusatory body of twelve thanes of whom Freeman says: "That they certainly do not amount to jury trial as jury trial is now understood."

Turner (1 Vol., p. 535) in his history of the Anglo Saxons says with much complacency: "It is not contested that the institution of a jury existed in the time of the Conqueror. The document which remains of the dispute between Gundulf, the Bishop of Rochester, and Picot, the Sheriff, ascertains the fact." This was a dispute as to lands. It was tried before the King's brother,

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*1 Norman Conquest V. 302,

Odo, the malodorous Bishop of Bayeux, not by a jury, not by twelve recognitors but by "all the men of Kent." They decided in favor of the Sheriff, who really represented the King's interest in the case, and because Bishop Odo doubted the honesty of their decision they were compurgated by twelve of their own number. Subsequently they confessed that they had all perjured themselves.

This most assuredly is not trial by jury.

We have, however, a record of William's reign that should be able to put to rest forever all these childish notions about trial by jury at the time of the Conquest. It is the most authentic, and, for its period, the most instructive record in the whole history of English law. We refer, of course, to Domesday. In its pages may be found conclusive evidence that trial by jury was unknown in the days of the first Norman king. Domesday shows us this same Picot trying to defend his possession of lands claimed by one William de Chernet. The entry tells us that William claimed the land, alleging it to belong to the Manor of Cerdeford, a fee of Hugh de Port, his grantor. In support of his claim he produces as his witnesses before the three Commissioners who were taking the inquisition, the men of most account in the whole county and hundred. Picot on his side produces a host of villeins, common folk and reeves as his witnesses, who offered to confirm their statement by compurgation or by the ordeal or judgment of God. The witnesses for William insisted, however, upon having the dis-

puted question determined according to the law of King Edward. I.

Domesday is full of disputes about the ownership of land. These disputes were passed upon and settled judicially by the voice of the shire, the hundred, the wapenlake, the tithing; but not in a single instance is there any account of any procedure that can be distorted by the wildest imagination into trial by jury.

Reeves is cited as authority for the statement "That it was not till the reign of Henry II that the trial by jurors became general." If trial by jury existed in the days of Alfred, as the imaginative Finalson insists and Mr. Justice Depue believes, how can we account for its taking so long a time—almost three centuries—to become general? The truth is that trial by jury no more existed in the reign of Henry II than it existed in the reign of Alfred.

We are informed, in the opinion, that "the progress made in bringing this trial [by jury]

I. *Istam terram calumniatur Willelmus de Chernet decens pertinere ad manerium de Cerdeford feudum Hugonis de Port per hereditatem sui antecessoris et de hoc suum testimonium adduxit de melioribus et antiquis hominibus totius comitatus et hundredi et Picot contra duxit suum testimonium de villanis et vili plebe et de praepositis qui volunt defendere per sacramentum aut per Dei judicium quad ille qui tenuit terram liber homo fuit et potuit ire cum terra sua quo voluit. Sed testes Willelmi noluerunt accipere legen nisi regis E (44b Dom. Ex.).*

into common use was attributed to a law enacted by that King"—Henry II—"which ordained that all questions of seizin of land should be tried by a recognition of twelve good and lawful men, sworn to speak the truth. The proceeding was called '*per assisam*' and '*per recognitionem*' and the persons composing it were called 'juratores,' 'jurate' 'recognitores' 'assisa' and collectively 'assisa' and 'recognitio.' The author—Reeves—further says that the oath of twelve jurors was resorted to in other instances than those provided for by this law and then this proceeding was said to be 'per juratam patriae' or 'viceneti,' 'per inquisitionem,' 'per juramentum legalium hominum.' This proceeding * * * was sometimes used in questions of property but, it would seem, more frequently in matters of a criminal nature."

The "law" said to have been "enacted" by Henry II is none other than the assizes of Clarendon and of Northampton. The opinion confounds the grand assize and the four petty assizes of Utrum, Mort d' Ancestor, Novel Disseisin and Darrien Presentment, all of which were exclusively of a civil nature, with the separate and distinct and exclusively criminal recognitions which were provided for by the legislation of Clarendon and of Northampton.

The Grand Assize adjudicated upon disputed rights to real property. The Petty Assizes were purely possessory actions. The notion is utterly false that any of these Assizes ever tried a criminal case. The writ of assize in every instance propounded the single issue that was to be submitted to the recognitors, and that issue re-

lated either to the title to land or to the possession of it. It is, however, correct to say that a civil issue other than that stated in the writ, but collateral to it, was sometimes submitted to the recognitors who had been summoned to hold the Assize; but when such a collateral issue was submitted to them the Assize was said to fall and to be turned into a *jurata*. If for instance, in an Assize of *novel desseisin* the tenant should plead that the tenement was held by tenure in villeinage, this, if true, would defeat the claim of the demandant. It would, therefore, be important to determine the quality of the tenure. But as the quality of the tenure was not the specific question raised by the writ the Assize would be abandoned and the recognitors as *jurata patriae* would proceed to determine the quality of the tenure. This change from an assize to a jurata was expressed by the old lawyers in the formula "*Cadit assisa et vertitur incuratam.*"

The assize of Clarendon, however, and the assize of Northampton in the following year, contained articles regulating or establishing the proceeding by recognition in criminal cases wholly distinct from the civil recognitions. The first article of the former assize provided for a recognition by twelve lawful men of the Hundred and four lawful men of each Vill, who were to declare on their oaths whether there was, in the Hundred or in any Vill, any man suspected or accused of being a robber or a murderer or a thief or a harborer of robbers or of murderers or of thieves. By the latter assize it was enacted that if any one were accused before the King's justices of any of these

offenses or of forgery or of arson, by the oaths of twelve Knights of the Hundred and of four men of each Vill, he was to be sent to the ordeal of water. If he failed at the ordeal he was to suffer the loss of a foot; if he succeeded he was to be banished the realm. The method of procedure before the justices in eyre was for the twelve hundredors to present on their oath that the defendant was guilty or was suspected of being guilty of any of these crimes. Then the representatives of the wills were sworn. If they concurred with the hundredors the defendant was forced to the ordeal. Stubbs says: "By the Assize of Clarendon inquest is to be made through each county and through each hundred by twelve lawful men of the hundred and by four lawful men of each township 'by their oath that they will speak the truth.' By these all persons of evil fame are to be presented to the justices (in eyre) and then to proceed to the ordeal; if they fail in the ordeal they undergo the legal punishment (*alterum pedem amittere*); if they sustain the ordeal, yet, as the presentment against them is based on the evidence of the neighborhood *on the score of bad character*, they are to abjure the realm."

"The system thus established," says Mr. Justice Stephens, "is simple. The body of the county are the accusers. Their accusation is practically equivalent to a conviction, subject to the chance of a favorable termination of the ordeal by water. If the ordeal fails, the accused person loses his foot and his hand. If it succeeds, he is, nevertheless,

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[1]Stubb's Cons. Hist., I. 614.

to be banished. Accusation, therefore, was equivalent to banishment, at least."[2]

And this is what the Court of Errors and Appeals calls trial by jury![3]

Judge Depue says: "It is conceded by all who have written on this subject that before Magna Charta trial by jury was a trial before a tribunal established for the determination of matters of fact, consisting of twelve men, whose decision could, only be by the consent of all. The words 'trial by jury' had a definite and fixed meaning at the time of Magna Charta, as well settled as any other term known to the Common law." This is sufficiently dogmatic, but is it true?

In the suit of the Bishop of Ely vs. the Abbot of St. Edmunds, in the twelfth year of John, there was a jury of eighteen Knights, six of whom were chosen by each litigant and six by Hubert Walter and Geoffroy Fitz Peter! There are repeated

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[2]I Hist. Cr. L. of Eng., 252. The loss of a hand was added to the penalty by the Assize of Northampton.

[3]Here is an entry Anno 1201: Hundredus de Esta. Juratores dicunt quod male credunt W. F. de morte A. de C. ita quod die procedente minatus fuit ei de corpore et catallis suis. Et iiij villatae juratæ proximae malecredunt eum; inde Consideratum est quod purget se per aquam per assisam (Select Pleas of the Crown, Pl. 5). The date of this entry is perilously near the date of Magna Charta, when, we are given to understand by the Court, trial by jury was a flourishing institution.

entries, in the Year Books, of criminal trials before tribunals of forty-four men—the combined recognitors of two hundreds and four vills.

Here is a specimen of "trial by jury" as practiced in the thirty-fourth year of Henry III. In a suit about land ten recognitors and ten charter witnesses were summoned. Simon, the feoffor, was declared by the recognitors to have been *non compos* at the time of the enfeoffment. The seven charter witnesses pronounced him *compos*. Thereupon one of the parties to the litigation offered the King twenty marks for the privilege of adding to the panel eight men of Northamptonshire and eight of Huntingdon who had known Simon ("qui habuerunt notitiam de predicto Simone") and the other side offered ten marks for the privilege of adding eight men of Bedford and eight of Buckinghamshire. The King, like the frugal man he was, took the money from both sides and ordered the thirty-two recognitors to be added to the panel as requested! I.

Here then was a trial by a tribunal consisting of forty-two recognitors and seven charter witnesses who acted as recognitors. Was this trial by jury? In 1249, parts of Winchester had become infested with robbers; lawlessness was rampant, and thugs generally were in a very sad way. Then, we are told "The King came down to Winchester, assembled the freeholders of the County in the castle, raged and stormed against them; he would try the whole County for treason by all the other

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Select Civil Pleas, 183.
1 Curia Regis Roll No. 140. M. 10.

counties of England. The gates of the castle were suddenly closed. A jury of twelve was sworn in and deliberated long. The jurors made a most inadequate presentment. They were forthwith committed to prison under sentence of death as manifest perjurers. Another jury was sworn in. After a lengthy and secret confabulation the string of their tongue was loosened and, in mortal terror, they denounced many rich and theretofore respected folk and even some members of the King's household. From thirty to a hundred men (according to the different reports of the affair) were hanged." One may, if he is so minded, go so far as to call this proceeding trial by jury. But calling it trial by jury will not assuredly make it trial by jury. It was a trial by recognitors, who on their own knowledge of the facts or common fame, accused men of crime and whose accusation was equivalent to a condemnation. The fact that these recognitors were acting under royal duress does not detract from the legality of the form of trial. I.

Now as to the unanimity of the "jury." In the Petty Assizes of Henry II a verdict could be rendered by seven recognitors.1 In Britton's time, the latter part of the thirteenth century, in criminal cases, if the majority of the recognitors knew the facts and the minority knew nothing of them judgment was to be given according to the finding of the majority.2 The doctrine of unanimity was

1. 2 Pollock & Maitland, Hist. Eng. Law, 652.
1. Bracton, f. 179*b*, 255*b*.
2. Britton, 1, 31.

not established until late in the reign of Edward III.3

But when unanimity began to be regarded as important a process was resorted to for securing it which deprived it of the peculiar value which it possesses in our modern system. If it turned out that some of the recognitors were ignorant of the facts upon which they were summoned and sworn to pass they were put off the panel and other recognitors who knew, or were supposed to know, the facts were substituted for them. The same course was pursued when a recalcitrant minority of the recognitors stood out against the proposed finding of the majority. This procedure was called "afforcing the Assize." In some instances the whole panel was quashed after having been sworn because of the ignorance of its members as to the matter in dispute and a new panel would then be sworn.1

It is a remarkable fact that in New Jersey at the present day the formal record in a criminal case describes the method of trial almost precisely

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3. Y. B., 41 Ed. III, p. 31.

I. Assisa venit recognitura si Adam de Greinville et Willielmus de la Folie dessaisaverunt injuste et sine judicio Willielmum de Weston de libero tenemento suo in Suto, post primam Coronationem Dominis Regis. Juratores dicunt quod non viderunt unquam alium saisitum de tenemento illo nise W. de la Folie. Et quod nesciunt si W. de la F. dissaisisset eum inde vel non, Consideratum est quod alii juratores eligantur qui melius sciant rei veritatem. Plac. Ab. 11, Wiltesir.

as it took place by recognitors in the days of Henry II. The record on a writ of error recites, "therefore let a jury come here before the said Court at, &c., of twelve good and lawful men of this State and resident within the County aforesaid by whom *the truth of the matter may be better known* and who are not of kin to the said defendant, to *recognize* upon their oaths whether the defendant be guilty or not guilty of," &c. It will be observed that according to the record the jurors are required to have personal knowledge of the controversy; they are to be men "by whom the truth of the matter may be better known." The function that, according to the record, they are called upon to perform is precisely the function that the recognitors of Henry's day were called upon to perform. They are "to recognize upon their oaths whether the said defendant be guilty or not guilty" of the crime charged against him. There is not a word in the record to indicate that any evidence of any kind is presented to them. They say, apparently upon their own knowledge, either that the defendant is guilty or that he is not guilty. This is indeed a singular survival of the form long after the essence of the thing has vanished.

Mr. Justice Depue says that "trial by jury, as previously known to the law, was comprised in the phrase (of Magna Charta) 'legal judgment of his peers or by the law of the land.'" This is a common delusion, but was exploded and repudiated by this Court in Hurtado vs. California.

Coke says, commenting on this phrase, "*Per judicium parium suorum*, by judgment of his

peers. Only a lord of parliament of England shall be tried by by his peers, being lords of parliament; and neither noblemen of any other country, nor others that are called lords, and are no lords of parliament, are accounted pares, peers, within this statute. And it is here called *judicium parium* and not *verdictum* because the noble men returned and charged are not sworn, but give their judgment upon their honor and legiance to the King."[1] Pollock and Maitland, in their great recent work, The History of English Law, say: "The cry for a judicium parium is (to the great distortion of history) supposed to find its satisfaction in trial by jury."[2] And: "In after days it was possible for men to worship the words 'Nise per legale judicium parium suorum vel per legem terrae,' because it was possible to misunderstand them. It is now generally admitted that the phrase 'judicium parium' does not point to trial by jury.[3]

Stubbs says: "The judicium parium was indeed no novelty; it lay at the foundation of all German law, and the very formula here used [in the Magna Charta] is probably adopted from the laws of Franconian and Saxon Cæsars." In support of this statement he cites an ordinance of Conrad the Salic which provided that a knight, holding of a tenant in capite, should not be deprived of his fief save "according to the custom of our ances-

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[1] 2 Co. Ins., 48, 49, or I. 2nd Plt. Co., Ins., 48, 49.

[2] Vol. I, p. 581.

[3] Vol. I, p. 152.

ters and the judgment of his peers." It will scarcely be pretended that trial by jury was known to the subjects of Conrad.1

Forsyth, referring to the *judicum parium* of Magna Charta, says: "The pares here spoken of have no reference to a jury."

Macclachlau says it is "a popular and remarkable error that the stipulation for the *judicium parium* in Magna Charta referred to the trial by jury. It (the *jndicium parium*), was a phrase perfectly understood at the period of Magna Charta and the mode of trial had been in use long before in France and in all parts of Europe where feuds prevailed. It was essentially different from the trial by jury which could never be accurately called *judicium parium*. He adds "not a single instance can be found in any charter in which the jury are called *pares* or their verdict *judicium*." 2

Although Coke's historical notions are about as valuable as his etymological notions yet he is undoubtedly right in his explanation of the *judicium parium*. This is shown by the record, cited by him, 1 Ins., 48, from the rolls of parliament of the reversal of the attainder of Thomas of Lancaster.

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1 "Præcipimus * * * ut nullus Miles * * * tam de nostris majoribus valvassoribus quam eorum militibus, sine certa et convicta culpa, suum beneficium perdat nisi secundem consuctudinem antecessorum nosrorum et judicium parium suorum." (1 Stubbs, Cons. L., 537).

1 Tr. by Jury, 92.

2 Eng. Ency. III Art., Jury.

It alleges, "*Quod contra cartam de libertatibus, cum dictos Thomas fuit unus parium et magnatum regni, in qua continetur quod dominus rex non super eum ibit nec mittet nisi per legale judicium parium suorum, tamen per recordum praedictum tempore pacis absq. aranamento seu responsione seu legali judicio parium suorum contra legem et contra tenorem Magnae Chartae,*" &c.

It will be observed that the right of Thomas to his *judicium parium* is here put expressly on the ground that he was *unus parium et magatum regni*. This ground would have been untenable if *judicium parium* meant trial by jury; for while the meanest free man in the land would, on that hypothesis, have been entitled to trial by jury, a peer prosecuted at the suit of the Crown, as Thomas had been, would not have been entitled to trial by jury. Coke (1 Ins., 48), speaking of the *judicium parium* declares that a peer is to be tried by jury only "if an appeal be brought against him, which is the suit of the party."

If anything in Magna Chartae can be deemed to so much as squint at trial by jury it is not the *judicium parium* but the *lex terræ* of Cap. 29. The *lex terrae* is defined by 37 E. III to mean "due process of law," and Coke says that "due process of law" means that "no man be put to answer without presentment before Justices, or thing of record, or by due process, or by writ original, according to the old law of the land." The *lex terrae* was not indeed trial by jury but had in it the germs of trial by jury; the *judicium parium* developed into trial before the Lord High Stewart and the House of Lords.

Judge Depue, speaking of the peremptory challenge, says, that "the means by which they (the jurors) would be selected and impanelled constituted no part of the essential features of trial by jury at common law." He is flatly contradicted in this proposition by the Supreme Court of the United States, which said, in Strauder vs. West Virginia (100 U. S., 664): "The right to a trial by jury is guaranteed to every citizen of West Virginia by the constitution of that State; and the constitution of juries," *i. e.* the means by which they are to be selected and empaneled, "is *a very essential part* of the protection such a mode of trial is intended to secure."

The assertion of Judge Depue that the means by which jurors "were to be selected and empaneled constituted no part of the essential features of trial by jury at common law," is historically erroneous.

The law of England provided that a jury should consist of twelve men; that they should be impartial and that their verdict should be unanimous.

The law of England also prescribed the means by which the jurors were to be selected and empaneled. The law as to the number, impartiality and unanimity of the jury was of no more binding effect than the law regulating the means of selecting and empaneling them. For no part of the law of England is of greater obligation than any other part. At common law the right of a defendant on trial for murder to twenty peremptory challenges, rested on precisely the same foundation and was quite as solemnly secured to him as his right to

twelve impartial jurors. The law of England awarded to him the twelve impartial jurors; the law of England awarded to him the twenty peremptory challenges. His conviction, if he were restricted to less than twenty peremptory challenges, would have been quite as illegal as his conviction by a panel of less than twelve jurors. The Parliament might, at its pleasure, change the means of empaneling and selecting jurors; but it would have been equally competent for Parliament at any time, if so disposed, to change the numerical composition of the jury, or to do away with the requirement as to unanimity, or even to abolish trial by jury altogether. The men who drafted our Constitution of 1776 knew the law of England in relation to trial by jury. They knew that impartiality was essential to the integrity of that mode of trial. They knew the methods which were provided by the law of England to insure impartiality. They approved of those methods. They desired to retain them. No one can believe that they were not utterly opposed to any diminution of the efficiency of those methods. And when they wrote in that Constitution that "the inestimable right of trial by jury shall remain confirmed as part of the law of this State without repeal forever," they meant, in the language of the Court of Errors and Appeals of New Jersey, in Edwards vs. Elliott, to perpetuate the right of trial "before a jury of twelve men according to the usual process and practice of the Courts of common law."

The Opinion says: "Although trial by jury, as that expression was understood at the time of Magna Charta, was guaranteed by that instrument

and secured to Englishmen as an inalienable right, the mode in which jurors were selected, their qualifications and extent of the right of peremptory challenges were matters committed to the power of Parliament. It would have been an entolerable grievance to have fixed in the Constitution of England unalterably all the details connected with trial by jury which were suitable to a prior age, but unsuited to later times. * * * Magna Charter is styled the 'Charter of the Liberties of Englishmen,' and occupies in the Constitutional law of England the place of our written Constitutions, Federal and State; and any act of Parliament contrary to Magna Charta is as completely invalid as acts of the Legislature are which contravene constitutional limitations (3 Co. Ins., 111; 1 Co. Litt., 81a; 2 Ins., 108)."

It would hardly be possible to accumulate, within so small a space, a greater store of various misinformation about Magna Charta and English constitutional law than is garnered in these passages from the Opinion. Magna Charta, we are told, secures trial by jury to Englishmen as an inalienable right, but such mere details as the mode of selecting jurors, their qualification and the extent of peremptory challenges were "matters committed to Parliament." By whom are we to understand these matters to have been "committed to Parliament?" What authority conceded to Parliament the power to regulate these details? By what conceivable procedure could these details or any of them or any provision on any subject have been "fixed in the Constitution of England unalterably"? What tribunal would assume jurisdiction

to pronounce an Act of Parliament, if contrary to Magna Charta, to be "completely invalid"?

The references to Coke, instead of supporting the extraordinary doctrine now, for the first time in legal history, presented to the world in this Opinion, contradict and refute it. There is no authority, respectable or not respectable, in the whole domain of English law that ever seriously disputed the propositions that Magna Charta was nothing more than an Act of Parliament; that it derived all its vigor from the fact that it was an act of the Parliament; that it never had any greater sanction than any other act of Parliament; that it was always subject to repeal at any time by Parliament and that no act of Parliament can restrict the omnipotence of succeeding Parliaments.

Judge Dupue cites 1 Co. Litt., 81a. There Coke says: "By the Statute of 25 Ed. I, Cap. 2, judgments given against any points of the Charters of Magna Charta or Charta de Foresta are adjudged void. And by the Statute of 42 E. 3, C. 1, if any statute be made against either of these charters it shall be void." It is doubtless upon this statement of Coke's regarding the Statute of Edward III, that the judge relies to sustain his assertion that an act of Parliament in derogation of Magna Charta would be void. But if the judge had examined the statute instead of being mislead by Coke's archaic phraseology, he would not have fallen into this error. That he was misled is clear enough for the Statute simply provides that Magna Charter and the Charter of Forests "soient tenuz et gardez en touz pointz et si nul es-

tatut soit fait a contrarie soit tenuz pur nul." Unless a meaning of which they have never heretofore been suspected, is to be ascribed to these words, they manifestly were designed to repeal antecedent legislation contrary to Magna Charter and to the Charter of Forests and have no prospective force or application. Coke, in the Proeme to the second part of his Institutes, says that by these words "all *former* statutes made against either of those charters are now repealed."

In the same page of Coke on Littleton, last referred to, we find a comment on Section 108 of Littleton, where the latter speaks of Magna Charter as "the Statute of Magna Charter." And there Coke says: "Though it (Magna Charter) be in form of a Charter, yet being granted *by assent and authority of parliament*, Littleton here saith it is a Statute." If Magna Charter was granted by the assent and authority of parliament, Magna Charter was a Statute, which, like all other acts of parliament, could have been at any time repealed by parliament. It is preposterous to say that an act of parliament is void because it is in derogation of an act of a preceeding parliament.

Elsewhere Coke emphasizes the fact that *Magna Charter* is merely a statute, when he says (2 Co. Ins., 524): "Whatsoever judgment is given against *the Statute* of Magna Charteris made void by this act, and may be reversed by writ of error *because the judgment is given against the law*". Judge Depue cites 2 Co. Ins., 108, and a reference to the text shows that it relates to the Statute of Marlbridge, 52 Henry III, which confirmed *Magna Charter*. The fact that many statutes were

passed from time to time confirming the Great Charter and repealing Acts of Parliament derogatory to it, demonstrates the falsity of the notion that an Act of Parliament in derogation of Magna Charter is, *ipso facto*, "completely void."

Mr. Justice Depue, in consonance with his theory as to the position of Magna Charta in English constitutional law, goes on to say: "There is not in any decision or treatise on the law of England any scruple expressed with respect to the validity of those statutes, passed after Magna Charta, which reduced the number of peremptory challenges below those which were previously allowed at common law." This statement is literally correct, but the inference which is manifestly intended to be drawn from it is utterly false.

The Judge's argument is that as trial by jury is secured inalienably by Magn Charta; as Magna Charta is in English law what our constitutions, State and Federal are in our law; as any act of parliament contrary to Magna Charta would be completely void; and as the validity of the several acts of parliament, passed since Magna Charta, reducing the number of peremptory challenges has never been questioned or doubted, therefore the number of peremptory challenges allowed in any case may be reduced without any impairment or diminution of the right of trial by jury as secured inalienably by Magna Charta.

The opinion goes on to say: "With full knowledge of the course of legislation in England, and also of the control permitted to parliament over the subject of peremptory challenges, it was declared

in our first Constitution that the right of trial by jury should remain confirmed as part of the law of this colony, without repeal, forever; and in the Constitution of 1844, that the right of trial by jury should remain inviolate."

Here then we have the Court's reasoning: Magna Charta occupies in English Constitutional law the same position as our constitutions, State and Federal, occupy in our law; Magna Charta secured the right of trial by jury inalienably; the Constitution of New Jersey secured the right of trial by jury inalienably; an Act of Parliament contrary to Magna Charta is, *ipso facto*, void; an act of the New Jersey legislature contrary to the State Constitution, is, *ipso facto*, void; but Parliament, since Magna Charta, has reduced the number of peremptory challenges that were allowed at the time of Magna Charta. Our Legislation since the adoption of the Constitution of 1844 has reduced the number of peremptory challenges that were allowed at the time of the adoption of that Constitution. The legislation in England reducing the number of peremptory challenges allowed at the time of Magna Charta has never been deemed to be contrary to the provision of Magna Charta, which secured the right of trial by jury inalienably. Therefore, the legislation in New Jersey reducing the number of peremptory challenges allowed at the time of the adoption of the Constitution of 1844 should not be deemed to be, and is not, contrary to the provisions of that constitution, which secured the right of trial by jury inalienably.

The defect of this reasoning is in its premises.

Neither trial by jury, nor anything else is inalienably secured by Magna Charta. Magna Charta does not mention trial by jury. Magna Charta does not occupy the same position in English constitutional law as our Constitutions, Federal and State, occupy in our law. An Act of Parliament contrary to Magna Charta would not be completely void but would be completely valid. The statement that no Court or writer has ever expressed any scruple as to the validity of Acts of Parliament, passed since Magna Charta, reducing the number of peremptory challenges, is true because no English Judge or writer could conceive of such a thing as a "scruple" with respect to the validity of an Act of Parliament. Coke says (4 Ins., 36): "Of the power and jurisdiction of the Parliament for making of laws in proceedure by bill, it is so transcendant and absolute as it cannot be confined either for causes or persons, within any bounds." He says its acts, even when contrary to reason and justice, are valid. He says it can convert an infant into a person of full age; it can pass attainders and can take the property, liberty and life of the subject without trial, cause or even accusation.

Coke says elsewhere (Ins. 4 part, p. 43): "Acts against the power of the Parliament subsequent bind not" and the reason is "for the latter Parliament hath ever power to abrogate suspend, qualify, explain or make void the former in the whole or in any part thereof, notwithstanding any words of restraint, prohibition or penalty in the former, for it is a maxim in the law of the Par-

liament, *quod leges posteriores priores contrarias abrogant.*"

In that very interesting book "The Commonwealth of England and Manner of Government thereof; compiled by the honorable Sir Thomas Smith, Knight; London 1589." we read "The most high and absolute power of the realm of England consisteth in the Parliament. * * * The Parliament abrogateth old laws, maketh new, giveth order for things past and for things hereafter to to be followed, changeth rights and possessions of private men, legitimateth bastards, establisheth forms of religion, altereth weights and measures, giveth form of succession to the Crown, defineth of doubtful rights whereof is no law already made, appointeth subsidies, tailes, taxes and impositions, giveth most free pardons and absolutions, restoreth in blood and name, and, as the highest court, condemneth or absolveth them whom the prince will put to trial. And to be short, all that ever the people of Rome might do either in *centuriatis comitiis* or *tributis*, the same may be done by the Parliament of England which representeth and hath the power of the whole realm both the head and body. For every Englishman is intended to be there present, either in person or by procuration and attorney, of whatsoever pre-eminence, state, dignity or quality soever he be from the prince, whether king or queen to the lowest person of England. This is the order and form of the highest and most authentical court of England."

The strongest possible evidence that Magna Charta does not occupy the same position in English Constitutional law as our Constitutions, Fed-

eral and State, occupy in our law and that an act of Parliament contrary to Magna Charta would not be completely void is found in the fact that by far the greater part of Magna Charta has been repealed by acts of Parliament. The Statute 12 Charles II, for instance, abolished the whole system of military tenures that was recognized and regulated by Magna Charta. Reliefs, aids, escuages and the other incidents of the feudal tenure of land, recognized and regulated by Magna Charta, have been swept away. The possessary assizes, recognized and regulated by Magna Charta, are gone. And even the famous Chapter 29 by which Mr. Justice Depue says trial by jury was "secured to Englishmen as an inalienable right," has been repeatedly disregarded by acts of attainder of unquestioned validity and by the establishment of the Court of Chivalry, and is now disregarded by the Act of Parliament creating Courts martial. Indeed, it is not going too far to say that there is not a single chapter of Magna Charta which has not been either wholly repealed or largely modified.

Chapter 25 of Magna Charta provides that the width of all dyed cloth shall be three yards.

Are we to understand that the width of dyed cloth is "unalterably fixed" in the British Constitution?

Chapter 21 of Magna Charta provides that the King's Sheriff or bailiff shall be entitled to hire a two-horse carriage at the rate of ten pence a day.

If this is a part of the British Constitution, it

is safe to assert that it has not yet penetrated the minds of the London hackmen.

The Supreme Court of the United States, in *Hurtado vs. California, 110 U. S., 516*, very accurately pointed out the distinction between Magna Charta and our Constitutions, Federal and State.

"The concessions of Magna Charta were wrung from the King as guarantees against the oppressions and usurpations of his prerogative. It did not enter into the minds of the barons to provide security against their own body or in favor of the commons by limiting the power of Parliament; so that bills of attainder, *ex post facto* laws, laws declaring forfeitures of estates and other arbitrary acts of legislation which occur so frequently in English history, were never regarded as inconsistent with the law of the land, for notwithstanding what was atributed to Lord Coke in *Bonham's Case*, 8 Coke, 115, 118*a*, the omnipotence of Parliament over the common law was absolute, even against common right and reason.

In this country written constitutions were deemed essential to protect the rights and liberties of the people against the encroachments of power delegated to their governments, and the provisions of Magna Charta were incorporated into bills of rights. They were limitations upon all the powers of government, legislative as well as executive and judicial.

"It recessarily happened, therefore, that as these broad and general maxims of liberty and justice *held in our system a different place and performed a different function from their position and office in English constitutional history*

and law, they would receive and justify a corresponding and more comprehensive interpretation."

Mr. Justice Depue, says: "If 20 peremptory challenges are essential to secure an impartial jury, then there has not been in England, nor is there in this State any constitutional mode of trying criminal cases of a grade less than those enumerated in the statute of Henry VIII and in the act of 1795." There is here some confusion of ideas.

When one speaks of a constitutional mode of trying criminal cases, in New Jersey, one speaks of a mode of trial prescribed, or at least permitted, by the Constitution of New Jersey. And the Constitution of New Jersey is a written document, a palpable and tangible entity, something that one may handle and scrutinize. But when one speaks of a constitutional mode of trying criminal cases in England one speaks of something that has, in our sense of the term, no existence at all. There is not, and there never has been, in our sense of the term, any constitutional mode of trying criminal cases, or any other kind of cases in England. There the mode of trial is and always has been fixed by the statutory or by the common law and either law is and always has been subject to alteration or repeal by parliament. In any of our States a law may be unconstitutional. In England a law cannot be unconstitutional. Its mere existence connotates and establishes its plenary validity for the power that makes the law is wholly unfettered by any constitutional restrictions in the domain of legislation.

II.

The plaintiff in error by his said trial before a struck jury was denied the equal protection of the laws guaranteed by the 14th amendment of the Constitution of the United States.

Under the law of Missouri appeals from the inferior Courts in four Counties of that State and in the City of St. Louis lay to the St. Louis Court of Appeals; while appeals from such inferior Courts in all other parts of the State lay to the Supreme Court of the State. It was contended in Missouri vs. Lewis (101 U. S., 22), that the inhabitants of the four Counties and of the City for which the Special Appellate Tribunal was provided were by this arrangement deprived of the equal protection of the laws.

The Supreme Court of the United States rejected this view of the matter. It said, by way of illustrating its decision, that the Legislature of New York might, without offending against the Federal Constitution, adopt the civil law and its procedure for the City of New York, and might impose the common law and its procedure on the rest of the State. The Court then proceeded to set forth the constitutional criterion of equal protection in the following words:

"If every person residing or being in either portion of the state should be accorded the equal protection of the laws prevailing there, he could not justly complain of a violation of the clause re-

ferred to. It (the clause) means that no person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons or other classes in the same place and under like circumstances. * * * The Fourteenth Amendment does not profess to secure to all persons in the United States the benefit of the same laws and the same remedies. Great diversities in these respects may exist in two states separated only by an imaginary line. On one side of this line there may be a right of trial by jury, and on the other side no such right. If diversities of law and judicial proceedings may exist in the several states withont violating the equality clause in the Fourteenth Amendment, there is no solid reason why there may not be such diversities *in different parts* of the same state. * * * Diversities that are allowable in different states are allowable in different parts of the same state."

In Hayes vs. Missouri (120, U. S., 68), it was insisted by the appellant that the equal protection clause was violated by an act of the Missouri Legislature, allowing the State fifteen peremptory challenges in cities of over 100,000 inhabitants, and eight peremptory challenges in the rest of the State. The Supreme Court said: "The Fourteenth Amendment to the Constitution of the United States does not prohibit legislation which is limited either in the objects to which it is directed, or by the territory within which it is to operate. It merely requires that all persons subjected to such legislation shall be treated alike under like cir-

cumstances and conditions, both in the privileges conferred and in the liabilities imposed."

In New Jersey a man tried by a struck jury for murder, and a man tried by an ordinary jury, for murder, are not "treated alike." The latter has twenty peremptory challenges; the former has only five.

In Duncan vs. Misssouri (152 U. S., 377), the Court said that the "equal protection of the laws" guaranteed by the Constitution exists "if the laws operate on all alike and do not subject the individual to an arbitrary exercise of the powers of government."

In Tinsley vs. Anderson (171 U. S., 101) the Court said: "The right to the equal protection of the laws was certainly not denied (to Tinsley) for it is apparent that the same law or course of procedure which was applied to Tinsley would have been applied to any other person in the State of Texas under similar circumstances and conditions."

A and B are separately indicted for murdering C. The "circumstances and conditions" of A and B are not only "similar" but are as nearly identical as it is possible for the "circumstances and conditions" of two men to be.

Yet under the New Jersey criminal procedure act the public prosecutor may try A before a struck jury and restrict him to five peremptory challengers and may try B before an ordinary jury and allow him twenty peremptory challenges. Would this be applying "the same law or course of precedure" to A and to B?

It, is, therefore, for the reasons above stated, confidently and respectfully submitted that the judgment against the defendant, brought up by this writ of error should be reversed.

WM. D. DALY,
Attorney and Counsel with Plaintiff in Error.

JOS. M. NOONAN,
Of Counsel with Plaintiff in Error.

In Writ of Error to the Court of Pleas and Quarter Sessions of Hudson County, New Jersey.

Motion to Advance Cause on Calendar Assignment of the Middle Term and Reasons for the Application and Notice of Motion.

JAMES A. REVIL,

Attorney and of Counsel for Defendant in Error, and Prosecutor of the Pleas, Hudson County, N. J.

United States Supreme Court

JAMES K. BROWN, Plaintiff in Error,	October Term 1899.
and	No. 290.
THE STATE OF NEW JERSEY, Defendant in Error.	Motion to Advance.

Comes now the defendant in error, by its counsel in that behalf, and moves the court to advance the said cause upon the calendar.

JAMES S. ERWIN,

Attorney and of Counsel with Defendant in Error.

STATEMENT OF FACTS.

James K. Brown, the plaintiff in error, was indicted at the April Term, A. D., 1898, of the Hudson County, N. J., Court of Oyer and Terminer for the murder of Charles Gebhardt on July 26, 1898.

The defendant was tried and found guilty of murder in the first degree on October 5, 1898, and he was sentenced to be hung on December 8, 1898.

The case was taken by writ of error to the New Jersey Court of Errors and Appeals and the judgment of the Court of Oyer and Terminer affirmed March 6th, 1899, and Brown was again sentenced to be executed on April 18, 1899.

Prior to this last named date and on April 5, 1899, a writ of error was allowed and taken from the United States Supreme Court to the Hudson County

Court of Oyer and Terminer, and allowed to act as a supersedeas by Mr. Justice Shiras. The writ of error to this court was returned with the record and the cause docketed August 4, 1899. On April 5, 1899, a citation was issued from this court and returnable therein; and the cause was docketed as No. 290 of the October Term, 1899.

REASONS FOR ADVANCING THE CAUSE.

1. The record shows the cause is a criminal cause, and under the rules of this court, and Section 710 of the Revised Statutes of the United States, the cause is entitled to precedence.

2. The record shows that the plaintiff in error was tried, convicted and sentenced under and by virtue of the laws of the State of New Jersey, and every right, privilege and assistance was accorded plaintiff in error under the constitution and laws of said State.

3. The record shows that the plaintiff in error after conviction in the trial court, applied for relief to the Court of Errors and Appeals of the State of New Jersey; the cause was duly heard by said Court on writ of error, and relief denied and the judgment of conviction affirmed.

4. The record shows that plaintiff in error is under sentence of death for the crime of murder, committed on July 26th, 1898; and the due administration of the laws of the State of New Jersey is delayed, pending the determination of the cause in this court.

5. The record shows that plaintiff in error was tried, convicted and sentenced in accordance with due process of law; that he was not denied any specific right, privilege or immunity under and by virtue of

the constitution and laws of the United States; that no Federal question was involved, and that the writ of error was taken for the purpose of delay.

Respectfully submitted,

JAMES S. ERWIN,

Attorney and Counsel for defendant in error, and Prosecutor of the Pleas for Hudson County, New Jersey.

[ENDORSED.]

United States Supreme Court. October Term 1899. No. 290. James K. Brown, Pltff. in Error, and The State of New Jersey, Def't in Error. On Error to State of New Jersey. Motion to advance. James S. Erwin, Att'y and Counsel of Defendant in Error.

UNITED STATES SUPREME COURT.

JAMES K. BROWN, Plaintiff in Error, and THE STATE OF NEW JERSEY, Defendant in Error.	October Term, 1899. No. 290. On Writ of Error. Motion to Advance.

Please take notice that a motion to advance the above stated cause will be submitted and made to said Court on Monday, the ninth of October, A. D. eighteen hundred and ninety-nine at the court rooms, at Washington, D. C., upon the opening of the above Court, on that day or as soon thereafter as the Court can attend to the same, and you are herewith served with a copy of the motion, statement of the matter involved and the reasons for the application.

Yours respectfully,

JAMES S. ERWIN,

Attorney of and Counsel for Defendant in Error, and Prosecutor of the Pleas, Hudson County, N. J.

To

JAMES K. BROWN,
Plaintiff in Error, and

WILLIAM D. DALY,
Attorney of and Counsel of Plaintiff in Error.

[ENDORSED.]

United States Supreme Court. James K. Brown, Plaintiff in Error, and The State of New Jersey, Defendant in Error. October Term, 1899. No. 290. Notice of Submission of Motion to advance Cause. James S. Erwin, Attorney for Def't in Error.

Supreme Court of the United States.

JAMES K. BROWN, Plaintiff in Error, and THE STATE OF NEW JERSEY, Defendant in Error.	October Term, 1899. No. 290. On Writ of Error to Hudson County, N. J., Court of Oyer and Terminer.

BRIEF FOR DEFENDANT IN ERROR.

STATEMENT OF CASE.

The writ of error in this cause brings before this Court for review, the conviction of plaintiff in error in the Court of Oyer and Terminer of Hudson County, N. J., of the murder, on July 26, 1898, of Charles Gebhardt, a police officer of the City of Hoboken, in said county. Brown was tried before Mr. Justice Lippincott and Judge Blair, and a struck jury, the trial beginning October 3, 1898, and plaintiff in error was convicted of murder in the first degree on October 5, 1898, and on October 14, sentenced to be hung on December 8, 1898.

By writ of error the case was taken to the New Jersey Court of Errors and Appeals, and the judgment of the Court of Oyer and Terminer was affirmed March 6, 1899; Brown was again sentenced to be hung on April 18, 1899. The opinions of the Court of Errors and Appeals are filed with the record in this cause (see printed copies of same). The majority opinion was by Mr. Justice Depue, and the judgment of the Court of Oyer and Terminer was sustained by eight of the judges of said court. A dissenting opinion was filed

by Mr. Justice Dixon and assented to by two other judges of the Appellate Court. On the main question as to the constitutionality of a struck jury, there was no division; and on the question of the denial of peremptory challenges the dissenting opinion expressly says same was not considered as involved in the case, as the defendant was allowed all the peremptory challenges he asked in the trial of the cause. The dissenting opinion was based upon alleged errors in the charge of the court on the question of self-defence.

On April 5th 1899, the case was brought to the United States Supreme Court from the Hudson County Court of Oyer and Terminer by writ of error, allowed to act as a supersedeas by Mr. Justice Shiras. The writ of error has been returned with the record and the cause docketed in this court as Number 290 of the October Term, 1899. A motion to advance the cause on the calendar of this court was made by defendant in error on the opening of the present October Term and granted; and the cause set for hearing on October 30, 1899.

The real question presented by the writ of error for the decision of this court is, were the statutes of New Jersey under which the traverse jury in the Hudson County Court of Oyer and Terminer was impanelled, in conflict with the provisions of the constitution of the United States, the fourteenth amendment thereto, or any public statute of the United States, and therefore void.

The statutes in question provided for what in New Jersey is called a "struck jury", and are as follows:

SECTION 75. "The Supreme Court, Court of Oyer and Terminer and Court of Quarter Sessions, respectively, or any judge thereof, may on motion in behalf of the State, or defendant in any indictment, order a jury to be struck for the trial thereof, and upon making said order the jury shall be struck, served and

returned in the same manner as in case of struck juries ordered in the trial of civil causes, except as herein otherwise provided."

"An Act relating to Courts having criminal jurisdiction and regulating proceedings in criminal cases (Revision of 1898)," approved June 14, 1898; P. L. (N. J.) 1898 page 894.

Section 76 of the same act (supra) "When a rule for a struck jury shall be entered in any criminal case the Court granting such rule may, on motion of the prosecutor, or of the defendant, or on its own motion, select from the persons qualified to serve as jurors in and for the county in which any indictment was found, whether the names of such persons appear on the Sheriff's book of persons qualified to serve as jurors in and for such county or not, ninety-six names, with their places of abode, from which the prosecutor and the defendant shall each strike twenty-four names in the usual way and the remaining forty-eight names shall be placed by the Sheriff in the box in the presence of the Court, and from the names so placed in the box, the jury shall be drawn in the usual way."

The manner of striking, serving and returning a struck jury ordered in civil causes, and referred to in section 75, (supra,) as the manner to be pursued where a jury is ordered to be struck in a criminal case is provided in an act entitled "A Further Supplement to an act entitled 'An Act concerning juries' (Revision) approved March twenty-seventh, one thousand eight hundred and seventy-four," and approved May 8, 1894, P. L. 1894, Chapter 146, page 211. This section amended the twenty-fourth section of "An Act Concerning Juries" found in Revision of N. J., approved March 27, 1874, page 528; and the above supplement may also be found in General Statutes of New Jersey, page 1856, section 62, and is as follows:—

"That when an order shall be made for a struck jury, the sheriff of the proper county, or other officer

who ought to impanel the jury in such a case, shall deliver at a certain day and place, to the judge of the court before whom the jury is to be struck, a book containing the names of the several persons in his county qualified to serve as jurors, with their places of abode; and the party applying for such struck jury, or his attorney, shall give six days previous notice to the adverse party or his attorney, and to the judge, sheriff or other officer aforesaid, of the time and place of striking the said jury; at which time and place the judge shall, in the presence of the parties or their agents or attorneys, or such of them as shall attend for that purpose, select and transcribe from the said book the names of forty-eight such persons, with their places of abode, as he shall think most impartial and indifferent between the parties, and best qualified as to talents, knowledge, integrity, firmness and independence of sentiment to try the said cause; and thereupon the party applying for such jury, his agent or attorney shall first strike one of the said names and then the adverse party, his agent attorney or shall strike out another, and so on, alternately, until each have stricken out twelve; but if the adverse party shall not attend such striking nor any person in his behalf, then the said judge shall strike for him; and when each shall have stricken out twelve as aforesaid, the remaining twenty-four shall be the jury to be returned to try the case; or the said judge may in his discretion permit either party to make a copy of said list so selected by him and postpone the actual striking of said jury, until a future day to be fixed by him, not less than five nor more than ten days from the day of selecting the said list, at which time the said parties or their agents, or such of them as may attend for that purpose, shall proceed to strike the said jury in the manner herein above directed, or as directed in the twenty-fifth section of this act, as the case may require; and then the said judge shall thereupon make a fair copy of the names of the remaining

twenty-four persons, with their places of abode, and certify the same under his hand to be the list of jurors struck as aforesaid for the trial of the said cause; which list shall be delivered to the sheriff or other officer who ought to summon such jury, together with the venire facias, by the person applying for such struck jury, his agent or attorney, at least ten days previous to the time appointed for the trial of such cause, and such sheriff or other officer shall thereupon annex the same list to the said venire facias and return the same as the panel of the jury to try the said cause, and summon them according to the command of the said writ; and in case of neglect or refusal to deliver the list and venire aforesaid, the cause shall be tried by a common jury of the county, unless the Court shall for some good cause determine otherwise."

The Twenty-fifth section of the act referred to in the foregoing section 62, provides for thirty-six jurors names to be on the list from which the striking is to be done, in place of forty-eight, but in the trial of civil causes only.

General Statutes N. J., Section 25, page 1849.

It will be observed that in criminal cases the list of jurors from which the striking is done contains ninety-six names, and each side strikes twenty-four, leaving forty-eight from which the trial jury is formed.

Section 76, (supra).

ARGUMENT.

I

What clause of the constitution of the United States, or of any amendment thereto, or of any statute of the United States was violated by the foregoing statutes of New Jersey, under which the jury was impanelled in this case in the trial court.

The only assertion in the trial court of a federal question was that the statute, under which the jury was impanelled was "*unconstitutional and void.*" (Printed record, page 11 .)

The only statement of a federal question in the New Jersey appellate court was that "the trial court erred in refusing to sustain the challenge to the array of the jury *because the act under which the jury was drawn is in violation of the constitution of the United States and the State of New Jersey.*" (Printed record, page 6 .)

General statements of alleged errors in the trial court or of violation of the Constitution, or any of the amendments, or federal statutes are not sufficient to raise a federal question.

> ***Cuday's Case, 131 U. S., 280, 286.***
> ***Whitten v. Tomlinson, 160 U. S., 231, 242.***
> ***Kohl v. Lehlbach, 160 U. S., 293, 296.***
> ***Clarke v. McDade 165 U. S., 168, 172.***

Neither the trial court nor the state appellate court decided any question as to the validity of the New Jersey statutes being repugnant to the Constitution or Statutes of the United States.

> ***Murdock v. Memphis, 20 Wall, 590, 635.***
> ***Eustis v. Belles, 150 U. S. 366.***
> ***Bacon v. Texas, 163 U. S., 207, 216.***
> ***Harrison v. Morton, 171 U. S., 38, 46.***

There is nothing in the Constitution of the United States, or any amendment thereto, excepting possibly

the fourteenth amendment, affecting the questions sought to be raised in this case. No specific violation of any provision of the federal constitution can be sustained. No privilege or immunity of plaintiff in error, attaching to him as a citizen of the federal government under the constitution, was violated nor under any of the amendments to the federal constitution which it may be alleged were violated.

The 14th Amend't to the U. S. Constitution. Guthrie, p. 58.

The privileges and immunities arising out of the nature and essential character of the national government and granted or secured by the constitution of the United States are those protected by the Fourteenth Amendment to the Federal Constitution.

Slaughter Houses Cases, 16 Wall, 36, 74.
U. S. v. Cruikshank, 92 U. S., 542, 549.
In re Kemmler, 136 U. S., 436, 448.

1. That part of the fourteenth amendment which it may be alleged is applicable to this case is as follows:

"No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

(a.) WHAT PRIVILEGE OR IMMUNITY OF PLAINTIFF IN ERROR AS A CITIZEN OF THE UNITED STATES WAS INFRINGED OR ABRIDGED. He was given a trial by an impartial jury of twelve men in the State and county where the crime was committed. Under the federal constitution this means only—what is commonly understood as a jury—twelve men—unanimity in the verdict—impartiality—drawn from the county or place of crime.

Hayes v Missouri, 120 U. S., 71.
Thompson v. Utah, 170 U. S., 343, 349.

(*b.*) HE WAS NOT DEPRIVED OF LIFE, LIBERTY OR PROPERTY WITHOUT DUE PROCESS OF LAW. He was tried by due process of law under laws of the State of New Jersey, and by what is generally understood as *due process of law.*

Pennoyer v. Neff, 95 U. S., 714, 733.
Hurtado v. California, 110 U. S, 516, 535.
Caldwell v. Texas, 136 U. S., 692, 697.

(*c.*) HE WAS NOT DENIED THE EQUAL PROTECTION OF THE LAWS WITHIN THE JURISDICTION OF NEW JERSEY. He was tried under laws applicable to all her citizens or those violating her laws—as the words EQUAL PROTECTION OF THE LAWS are understood in the Fourteenth Amendment.

Missouri v. Lewis, 101 U. S. 22, 31.
Hayes v. Missouri, 120 U. S. 68.
Caldwell v. Texas (supra).
In re Converse, 137 U. S. 631.

2. In line with the fourteenth amendment Section 709 of the "Revised Statutes," U. S. (1873-1874) page 133, title "Supreme Court Jurisdiction," Chapter XI, was passed, regulating the procedure whereby cases were to be brought from the State Courts to this court for review, where the validity of a state statute was drawn in question as repugnant to the Constitution and Laws of the United States, and the decision was in favor of the validity of the state statute. This Section 709 is as follows:

"A final judgment or decree in any suit in the highest court of a state, in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision is against their validity; or where is drawn in question the validity of a statute of, or an authority exercised under any State, on the ground of their being repugnant to the

constitution, treaties, or laws of the United States, and the decision is in favor of their validity; or where any title, right, privilege, or immunity is claimed under the Constitution, or any treaty or statute of, or commission held or authority exercised under, the United States, and the decision is against the title, right, privilege, or immunity specially set up or claimed, by either party, under such Constitution, treaty, statute, commission, or authority, may be re-examined and reversed or affirmed in the Supreme Court upon a writ of error. The writ shall have the same effect as if the judgment or decree complained of had been rendered or passed in a court of the United States. * * *"

The Fourteenth Amendment was not designed to interfere with the power of the states to protect the lives, liberties, and properties of its citizens and to promote their health, peace, morals, education and good order, nor to restrict the legitimate sphere of the legislative power of the state.

In re Kemmler (*supra*).

3. The decisions of the Courts of New Jersey even if a federal question was involved will not be reversed if there is another independent ground of the decision by the state court upon which its judgment can rest.

Murdock v. Memphis (*supra*) *635.*
Egan v. Hart, 165 U. S. 11.
Bacon v. Texas, (*supra*).

The same questions relative to the validity of the struck jury laws of New Jersey were raised and argued by the same counsel as appear in this case at the last term of this Court, in the case of Clifford v. Heller reported without opinion, in 172 U. S. 641. This case of Clifford v. Heller is again pending in this Court on a second appeal from an order of the United States Circuit Court Judge for the District of New Jersey denying a writ of habeas corpus, and the validity of the

struck jury laws of New Jersey is again raised in the Clifford case. It is of great importance that this Court decide the questions raised in this cause, as such decision will control this and other cases depending on such decision, and to prevent delay in the administration of the criminal laws of New Jersey.

II.

The jury as impanelled and sworn in the cause was a legal jury, as known to the courts of this country, and as derived through the common law, and the Constitution and Statutes of New Jersey.

FIRST:—WHAT IS A LEGAL JURY AS GENERALLY KNOWN AND UNDERSTOOD FROM THE DECISIONS OF THE COURTS OF THIS COUNTRY?

This Court has stated what is ordinarily understood by a legal jury in the case of *Thompson v. State of Utah, 170 U. S. 343.* Also reported in *Book 42, Lawyers Co-operative Edition, page 1061,* where are collected valuable notes on Jury and Jury Trials.

The jury at common law was required to be composed of twelve good and lawful men of the county where the crime was committed.

4 Black. Com. 350, 351
2 Hale's P. C. 161.
1 Chitty's C L. 505.
1 Thompson on Trials, p. 4, sec. 3.

By this was meant that they must be men sufficient; first, as to their property, secondly, as to their character and, thirdly, as to their age, quality, and the exemptions to which they may have been entitled.

1 Chitty C. L. p. 502.

For any want of these requirements the juror could be challenge by the accused, that is, he was challenged for cause.

4 Black. Comm. 353.

These jurymen were summoned at common law and returned by the sheriff on a writ of venire facias, but before the commissions of Oyer and Terminer and General Jail Delivery the sherriff's authority was a general precept and not a venire facias. As to the number of jurors returned, the statute of 3 Geo. 2, enacted that there must be a return of not less than forty-eight, nor more than seventy-two, but prior to that it was customary to return twenty-four jurors, but a larger or smaller number could be returned, and if twelve were sworn at the trial, the proceedings were valid.

1 Chitty Crim. Law, 505, 506.

There must be twelve men, but as to their qualifications there is no longer any property qualification in most of the States of the Union, and it has not been held that this is such a departure from the common law jury as to make such change unconstitutional.

5 Crim. Law Mag. p. 774 and cases

The origin, history and essentials of a valid jury are so thoroughly and learnedly discussed in the opinion of Mr. Justice Depue, who spoke for the majority of the New Jersey Court of Errors and Appeals, in this case in that Court, that nothing can be said in this brief that could aid the Court on the subject. This opinion is a well of knowledge from one of New Jersey's most learned jurists, one whose thirty-three years of experience as one of the judges of her highest court, give his opinions the sanction of learning fortified by the demonstration of actual practice and experience.

(*See the opinion returned with the printed record in the cause, and also printed in pamphlet form and a copy of which accompanies this brief.*)

SECOND:— THE JURY WHICH TRIED BROWN WAS A VALID JURY AS DERIVED THROUGH THE COMMON LAW AND THE CONSTITUTION AND STATUTES OF NEW JERSEY.

Struck juries existed at the common law, and were a constitutional form of jury trial adopted into the practice of the State of New Jersey.

In *Moschell vs. State, 24 Vroom (53 N. J. L.) 505,* (June Term 1891 N. J. Supreme Court) Justice Magie (now Chief Justice) delivering the opinion, after speaking of the division of juries said: "But courts have for a long period of time upon extraordinary reasons made orders for a special jury in a particular case. Bacon's Abr. tit. 'Juries.'

This ancient practice is now regulated by our jury act. Jurors thus ordered are not selected by the Sheriff, but by the court or a judge. They are summoned, not for general service during a stated term, but for a special service in a single case."

This case was affirmed by the Court of Errors and Appeals at March Term, 1892. *25 Vroom (54 N. J. L.) 390.*

In the case of *Fowler v. State, 29 Vroom (58 N. J. L.) 423,* argued at November Term, 1895—of the New Jersey Supreme Court, before Chief Justice Beasley and Justices Magie and Ludlow, by the same attorney as now appears for the plaintiff in error, the contention was made "that the jury that had been struck was unconstitutional in as much as the fundamental law which declares that the right of trial by jury shall remain inviolate." (Constitution of New Jersey, Article 1, Section 7) "calls for an ordinary jury and not for a special one."

The learned Chief Justice, than whom there was no greater scholar learned in the common law—answered the contention as follows: "The obvious answer to

this objection is that the trial by struck jury was part of the system of legal procedure derived by the people of this State from the English law, and that it was confined and regulated by legislation in this commonwealth as early as the year 1797, (Pat. L.) which was forty-seven years before the constitution of 1844 was established."

"The constitutional mandate referred to, therefore did nothing more than to ratify and perpetuate the right of trial by jury *as in substance*, it then existed."

Article 1, Section 7, Constitution of New Jersey (adopted 1844, reads: "The right of trial by jury shall remain inviolate, but the legislature may authorize the trial of civil suits when the matter in dispute does not exceed fifty dollars, by a jury of six men". Same article, section 8, reads: "In all criminal prosecutions the accused shall have the right to a speedy and public trial by an impartial jury; to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor and to have the assistance of counsel in his defence."

The judgment of the Supreme Court in the case of Fowler v. State (supra) was at the November Term 1896 of the New Jersey Court of Errors and Appeals affirmed by a unanimous vote. *30 Vroom (59 N. J. L.) 585.*

In what respect under the law of New Jersey did the method of trial by struck jury infringe upon the constitutional provisions respecting a trial by jury. Wherein did the jury that tried Brown differ from a jury drawn by a Sheriff from the general panel. The number forty-eight from which the trial jury was drawn, and left from the list of ninety-six after each party had struck twenty-four, was the same as would have been the special panel or list of the jury and from which special panel or list would have been taken the jury of twelve. *Chapter 237, Section 82 P L. (N. J.) page 897.*

The jurors were drawn from the same county as an

ordinary Sheriff's jury. The number of the trial jury was secured to the defendant, namely, twelve good and lawful men. They were all duly qualified. Instead of being selected by the Sheriff from the general panel they were selected in open court in presence of the defendant and his counsel from among the several persons in the county qualified to serve as jurors, and from the list so selected the panel of twelve was formed. There was an application and order in open court for the jury granted on motion of the State of which the defendant had previous notice. Defendant as well as the state could have applied for a struck jury. The venire to summon the jury issued to the Sheriff and was returned by him. The defendant had the right and did reject and strike twenty-four names, and had in addition his five peremptory challenges; thus in effect having twenty-nine peremptory challenges, as well as his common law challenges to the array or to the polls. In this case he was allowed all the peremptory challenges he claimed, and as the dissenting opinion of the N. J. Court of Error and Appeals expressly states, the plaintiff in error was not entitled to a reversal on this ground. In the method of selection by the Court instead of by the Sheriff alone appears the only difference. The method of forming the jury actually secured to the defendant a better jury than is usually obtained from the general panel. The list of jurors was selected by the court from the Sheriff's list of those liable to jury duty, and under the provisions of the struck jury law the selection was of men "*most impartial and indifferent between the parties and best qualified as to talents, knowledge, integrity, firmness and independence of sentiment to try the cause.*" The defendant had this list twenty days before the trial.

The New Jersey constitutional requirements "that the right of a trial by jury shall remain inviolate" and "that in all criminal prosecutions the accused shall have the right to a speedy and public trial by an impartial jury," was in no way violated as the impartial-

ity of the jury was secured to the defendant and a better jury obtained than under the system of drawing a trial jury from the general panel as petit juries are usually formed.

Bouvier's Law Dictionary, Vol. 2, p. 538, Title "Special Jury," defines a special jury as "one selected in a particular way by the parties. A panel is made out and each party is entitled to strike from it the names of a certain number of jurors, as provided for by the local statutes, and from those who remain, the jury in that case must be selected. This is also called a struck jury." The same author at page 684, Vol. 1, under the title "jury" defines same as "a body of men selected according to law for the purpose of deciding some controversy" and under the same title, sub-division 6, says "it is scarcely practicable to give the rules established in the different states to secure impartial juries; it may, however, be stated that in all the selections of persons who are to serve on the jury is made by disinterested officers, and that out of the list thus made out the persons are selected by lot."

As stated by the Court in *Fowler v. State* (*supra*) as early as 1797 New Jersey passed an act providing for struck juries.

This act did not extend to an indictment for an offense where the party was entitled to peremptory challenges. R. L., (N. J.) p. 313.

This statute was incorporated in the act concerning "Juries and Verdicts" in the Revision of 1845—of New Jersey—Rev. Statutes, p. 968, and with a law passed in 1851 relating to struck juries, P. L., (N. J.) 1851, p. 92; was carried into the Revision of 1874 and may be found in the act concerning "Juries," Revision 1874 (N. J.) p. 527, Section 12, and is as follows:

"The Supreme Court, the Circuit Courts, the Courts of Common Pleas, Court of Oyer and Terminer and General Jail Delivery, and the Courts of General Quarter Sessions of the Peace, respectively, may on motion in behalf of the State, or of any prosecutor or defendant in any indictment or information in the

nature of a *quo warranto*, or on motion in behalf of the State; or of any plaintiff or defendant, in any action triable by a jury, order a jury to be struck for the trial thereof, provided that no order for a struck jury shall be made in any civil action unless the Court or Judge to whom the application is made shall be satisfied by affidavit, that the nature and importance of the matter or matters in controversy in such suit or action render it reasonable and proper that said order be made."

By this revision the power to order a struck jury was conferred upon the courts named on the trial of any indictment, and without any exception or proviso, as to cases where a party was entitled to peremptory challenges as in the act of 1797—and this is substantially the same provision of law now in force as *Section 75 (supra) of the Revision of 1898.*

The decision of the New Jersey Court of Errors and Appeals construing the statutes in question, and that same do not violate the Constitution of New Jersey, will be conclusive on this Court and even though this Court may differ from the State Court.

***Murdock v. Memphis** (supra) p. 611.*
Louisiana v. Pilsbury, 105 U. S. 278.
McElvaine v. Brush, 142 U. S. 155.
Hallinger v. Davis, 146 U. S. 319.
Forsyth v. Hammond, 166 U. S., 506.
14th Amendment, Guthrie, p. 44.

THIRD:—IT MAY BE URGED IN THIS COURT (1) THAT BECAUSE THE CRIME WITH WHICH DEFENDANT BELOW WAS CHARGED (MURDER) WAS A FELONY AT COMMON LAW, A STRUCK JURY COULD NOT BE HAD AT COMMON LAW IN CASES OF FELONY, AND HENCE THAT THE STATUTES OF NEW JERSEY RELATING TO STRUCK JURIES IN CAPITAL CASES WERE UNCONSTITUTIONAL

AND (2) THAT HAVING BEEN TRIED BY A STRUCK JURY DEFENDANT WAS DEPRIVED OF HIS COMMON LAW RIGHT OF TWENTY PEREMPTORY CHALLENGES.

(1) As to the first of these contentions much ancient learning may be brought forward to show that a struck or special jury could not be had at common law in cases of felony.

In New Jersey the division of crimes into felonies and misdemeanors, as same existed at the common law with all the incidents in felony of forfeiture, death for almost every offence, and other characteristics never existed.

"The word felony in the general acceptation of English common law comprised every species of crime which occasioned at common law the forfeiture of lands or goods."

4 Black. Comm. 95.

In New Jersey where all offences are statutory, felony has no distinct, well defined meaning applicable to our system of criminal jurisprudence, and such as in this case is sought to be read into the constitution as affecting the provision for a jury trial.

As said by His Honor, Mr. Justic Depue, in the case of *Jackson v. State—February Term, 1887, 20 Vr. (49 N. J. L.) 255.* "The criminal code of this State wholly ignores the distinction between felonies and misdemeanors. Statutory offences if designated at all, are called in the "Crimes Act" either misdemeanors or high misdemeanors. *Rev. p. 226.*" Considering the eminence of the jurists (Mercer Beasley, David A. Depue, Cortlandt Parker) who made the revision of 1874, and this decision on the designation of crimes, force is added to the argument that in New Jersey the term felony as used at common law, and therein including nearly every crime in the calendar, has no controlling effect—either in the constitutional provi-

sion relating to a jury trial, or any legislation on the subject of jury trial.

In Ohio where all offences are statutory, as in New Jersey, the Court say, "The term felony has no distinct and well defined meaning applicable to our system of criminal jurisprudence. In England it has a well known and extensive signification, and comprises every species of crime which at common law, worked a forfeiture of goods and lands. But under our criminal code the word FELONIOUS though occasionally used expressed a signification no less vague and indefinite than the word CRIMINAL."

Matthews v. State, 4 Ohio N. S. 542.

This construction of the word "felony" is shown by one of the early New Jersey acts relating to "crimes," Elmer's Digest (N. J.) 1838. The word felony is not found as a designation of any crime in this act. The same statement is true in relation to the same act in the Revision of 1877, N. J., and also in the last Revision of the "crimes" act, P. L. (N. J) 1898, chapter 235. With this understanding of the word felony, as shown by its use in the criminal jurisprudence of New Jersey, the construction contended for by plaintiff in error is not to be maintained in the face of all the legislation and the foregoing decisions relating to struck juries in this State.

Under the common law larceny was a felony punishable with death (*4 Black. Comm. 237*). By the New Jersey statute it has always been a misdemeanor. As it was a felony at common law, plaintiff in error might contend that a person charged with larceny should not be tried before a struck jury, because under the common law no struck jury trials could be had in cases of felony. But being a misdemeanor under our law, it may be tried by a struck jury, if circumstances warrant. Has this made the juries in trials for crimes now changed to misdemeanors, any less impartial than in trials of the same crimes, as felonies at common law?

The Legislature has without question exercised the power to change the character of crimes, which before were felonies at common law and punishable with death forfeiture of lands and goods and all the penalties of attainder, reducing them to misdemeanors and softening the punishment. The Legislature has, in cases of former felony, taken away the attainders and forfeiture of lands and goods. In murder even, this has been done, and the crime has been divided into degrees, and the death penalty, though generally retained in the crime of murder, has been abolished in some States and in others changed in form, and the defendant been permitted to plead guilty and the Court, in place of a jury, empowered to fix the degree of the crime, and defendant has been permitted to entirely waive his constitutional right to a trial by jury.

Hallinger v. Davis (supra).
State v. Almy, 61 N. H. 428; 22 L. R. A. 744.

Even in crimes, felonies at common law and yet unchanged in character by statute, the Legislature can control the procedure for enforcing the law in the matter of impanelling the jury and regulating of challenges and providing for the punishment. To hold otherwise would be to prevent the States from legislating at all as to the grade of offences and their method of trial and punishment.

A strong effort was made in the Court of Errors and Appeals of New Jersey by the present counsel for plaintiff in error, to do away with the effect of the decision in *Fowler v. State* (*supra*) on the ground that Fowler was not indicted for a felony. He was indicted for conspiring to pervert the due administration of the election laws, a crime which while designated as conspiracy in the statute had a much deeper and extended meaning, than the old meaning of conspiracy at common law. In its effect the crime for which Fowler was indicted touched the very foundation of government and was as though treason had been committed against the State. Coming as did

the decision from Chief Justice Beasley, as the voice of the Court, it should have the effect of *stare decisis* in this case—on the question of struck juries at common law.

In February Term, 1827, the Supreme Court of New Jersey in the case of the *State vs. Lucien Murat, 4 Halstead (9 N. J. Law) 3*, charged with rape, (a felony at the common law, *4 Black Comm. 211*) granted a rule for a struck jury to try an indictment pending in the Oyer and Terminer in Burlington County.

Wall *for the defendant* said: "He was extremely anxious to have the indictment tried at the next Oyer and Terminer and to have the benefit of a special jury, and asked if the Court could grant a rule for a special jury to try a cause in the Oyer and Terminer. He had understood that there had been such a practice."

Chief Justice: "There are divers instances in which this Court has ordered special juries for the Oyer and Terminer."

R. Stockton, as *amicus curiae*, said "he recollected many instances in which it had been done but that he had always entertained doubts as to the propriety of it."

Chief Justice: "It has been the practice of this Court, therefore you may take a rule for a special jury."

The rules of the Supreme Court of New Jersey provided for struck juries.

1 Coxe (1 N. J. L.) Rule V., (1805.)
Elmer's Digest (N. J., 1838.) p. 694.

The designation of crimes into felonies and misdemeanors not having prevailed in New Jersey, the reason for the ancient practice at the common law in not allowing struck juries in cases of felony has ceased to exist.

The common law, as adopted by the Constitution of New Jersey, was itself subject to change.

"The common law and statute laws now in force,

not repugnant to this constitution, shall remain in force *until they expire by their own limitation, or be altered or repealed by the legislature* * * * ."

Constitution of New Jersey, 1844, Article 10, Schedule 1, General Statutes N. J., p. XXXVI.

A ~~somewhat~~ similar provision is to be found in the first Constitution of New Jersey, adopted July 2, 1776, and in Constitution of New Jersey, as amended September 7, 1875. *In all of these constitutions the common law was expressly subject to change by the legislature; and to now hold that everything connected with the ancient common law jury must remain as it was, and that the same is not subject in any way to change, would be incongruous and directly contrary to the provisions of the Constitution of New Jersey.*

All the State laws and decisions relating to the impanelling of the jury under such a holding would thereby be annulled and reversed, and the thousands of convictions heretofore had under State laws regulating the impanelling of the jury, held to have been void.

Under the common law the qualifications and method of impanelling the jury were changed from time to time by parliament—showing that the formation of the jury was subject to regulation and a matter of procedure. The States have generally legislated upon the subject.

The institution itself has barely preserved its own identity. It cannot be possible that the constitution intended to attach itself to the statute laws then in force and make them unchangeable. It aims rather to place the right beyond the power of the legislature to abridge, and at the same time to leave it in the power of the legislature to improve it from time to time to meet the ever changing phases of human affairs.

State v. Worden, 46 Conn. 365.

2. *As to plaintiff in error's contention, that by a struck jury he was deprived of his peremptory challenges.*

At common law he was originally entitled to thirty-five peremptory challenges, one less than three full juries.

4 Black. Comm. 354.

Subsequently by statute, 22 Henry VIII. c. 14, this was reduced to twenty.

4 Black. Comm. 354.

The legislation on this subject and the number of peremptory challenges allowed in capital cases in the different states has always been subject to the legislative will as is shown by the differences in the number allowed in the different states. The whole subject has always been within the legislative power and the number of peremptory challenges to be used either by the prosecution or the defendant may be restrained, limited or withheld altogether.

Rapalje Crim. Pr., Sec 185.
Archbold Criminal Prac. & Pl., (7th Ed. Waterman,) Vol. 1, p. 560.
American & English Enc. of Law, (1st Ed.) Vol. 12, p. 346.
American & English Enc. of Pl. & Prac., Vol. 12, p. 478.

In Walter v. People, 32 N. Y., p. 159 (1865), it was held: "It is provided by statute that on any trial for any offence punishable by death or by imprisonment in the State prison for the term of ten years, or for a longer term, the people shall be entitled peremptorily to challenge five of the persons drawn as jurors for such trial and no more. This is claimed to be an unconstitutional enactment, but with what provision of the constitution it conflicts is not apparent. The constitution of 1846, it is true, preserves the trial by jury, in all cases in which it had been theretofore

used, but this certainly is no limitation of, or restriction upon legislative power except as to the right guaranteed, viz., a jury trial in all cases in which it had been used before the adoption of the instrument. I am not aware of any other constitutional question that may be supposed to have the remotest bearing upon the question. Trial by jury cannot be dispensed with in criminal cases, but it is obviously within the scope of legislation to regulate such trial * * * * *. The subject of peremptory challenge has always been under legislative control. * * * * * * * Even though the right to peremptory challenges be given by common law, it could be restrained, limited or withheld altogether by the legislative will."

The number of peremptory challenges is a matter of legislative discretion, and may vary according to the constitution of different communities, and the difficulties in each of securing intelligent and impartial jurors.

Stokes v. People, 53 N. Y. 164, 173.
Hayes v. Missouri, (supra) 70.
Com. v. Dorsey, 103 Mass. 412, 419.

In Moschell v. State, (supra) Justice Magie announcing the opinion for the Court, said at page 504: "The provision for peremptory challenges in case of struck juries in criminal trials was first adopted by a supplement to the "Act relative to juries and verdicts," which was approved April 6, 1871, Pamphlet L., p. 111. It provides that in such cases the same peremptory challenges should be allowed as in other cases. When brought into the Revision this clause was so altered as to limit peremptory challenges in all cases to three in number and thereby the legislative intent was clearly manifested that the number of such challenges should not depend on the provisions of other laws."

If the contention of plaintiff in error is to prevail the legislature has no power over the number of peremptory challenges allowed at common law in

cases of felony. Yet from the time of the first constitution it has been continually exercised.

Under the common law the State had no right of peremptory challenge.

Archbold Cr. Pl. & Pr. (7th Ed. Waterman) p. 544.
4. Black. Comm. p. 353.

By Section VI, of "An act regulating proceedings in trials in criminal cases," passed the sixth day of March, 1795, Elmer's Digest N. J. (1838) p. 121, sec. 8, it is provided "Every person who shall be indicted for treason, murder, or other crime punishable with death, or for mis-prision of treason, manslaughter, sodomy, rape, arson, burglary, robbery or forgery, and shall voluntarily and duly plead the plea of not guilty to such indictment shall be admitted peremptorily to challenge twenty of the jury and no more," etc.

The next section 7, of the act last recited and being section nine Elmer's digest (*supra*), provides that, "Neither the attorney general nor any person prosecuting for and in behalf of this State, shall be admitted in any case to challenge any jury without assigning a cause certain to be tried and approved by the court; AND FURTHER the privilege of peremptory challenge shall not be allowed to offenders in any cases but such as are specified in the section immediately preceding" (*Supra*).

The section of the law first quoted provided for twenty peremptory challenges in the classes of crime mentioned—and the section secondly mentioned provided that no other persons than those provided in the preceding section, should be entitled to any peremptory challenges, and yet this law would be unconstitutional according to plaintiff in error's contention, because it deprives persons charged with crimes—as larceny, for instance, and which at common law was felony—of their peremptory challenges.

By subsequent legislation the State was allowed

three peremptory challenges and where defendant was not entitled to twenty peremptory challenges, this was increased subsequently to six, Gen. Stat.,(N.J.) p. 1856, sec. 63. In cases where defendant was allowed twenty peremptory challenges the State was allowed ten peremptory challenges, Rev. of 1877, (N. J.) p. 531, sec. 35, P. L. 1852, p. 32, and the defendant in any indictment in cases where twenty peremptory challenges were not allowed was given three peremptory challenges—Rev. 1877, p. 530, sec. 34, P. L. 1869, p. 619. This number was subsequently increased to ten, Gen. Stat. (N. J.) 1855, sec. 60, P. L. 1891, p. 24.

On the trial of every indictment before a struck jury three peremptory challenges were allowed. *Rev. 1877, (N. J.) p. 531, P. L. 1871, p. 111.*

In the "Criminal procedure" act, Revision of 1877, p. 280, sec. 71, a similar provision is found to section 8, p. 121, in Elmer's Digest, before quoted, and giving to defendant in the crimes mentioned twenty peremptory challenges, except that perjury or subordination of perjury are added to the crimes wherein twenty peremptory challenges were allowed, and the proviso at the end of this section 71 in the Revision of 1877 is as follows:

"PROVIDED, THAT NOTHING IN THIS ACT RESPECTING CHALLENGES SHALL APPLY TO CASES OF STRUCK JURIES." This same section is found in General Statutes of New Jersey, p. 1134, sec. 71, and in the Revision of 1898, P. L. 1898, p. 896, sec. 80, with the same proviso therein.

By the revision of 1898 (P. L. 1898,) p. 896, sec. 81, where twenty peremptory challenges are not allowed, the State is entitled to ten and the defendant to twelve peremptory challenges, AND IN THE TRIAL OF ANY INDICTMENT WHERE A STRUCK JURY IS ALLOWED, THE STATE AND DEFENDANT EACH IS ENTITLED TO FIVE PEREMPTORY CHALLENGES.

This legislation shows that the matter of per-

emptory challenges has been from the time of New Jersey's first constitution a matter of legislative control, and the decision in Moschell v. State (*supra*) supports and maintains such legislation, and hence the second ground of plaintiff's insistment that at common law he was entitled to twenty peremptory challenges is shown to be under legislative control. The reason asserted why at common law in cases of felony, struck juries were not allowed is, that the accused would thereby lose his peremptory challenges. The legislature controls the matter of peremptory challenges, and the felonies which at common law could not, as alleged, be tried before struck juries must be subject also to the legislative control so far as the method of jury trial is concerned, without affecting a defendant's constitutional rights. *Cessante ratione legis, cessat ipsa lex.*

III.

The legislature has a right to regulate the process whereby the jury is impanelled. There is nothing in the constitution to prohibit this so long as the right of trial by jury in substance is preserved. It is a matter of procedure and one for state regulation.

Is a special or struck jury in capital cases a jury less fair and less impartial than the ordinary jury of the common law? The Constitution of the United States has enacted that no State shall pass any ex post facto law, and in construing this clause it has been held that though the law which makes an act done before the passage of the law, and which was innocent when done, criminal, is ex post facto; and every law which aggravates a crime and makes it greater than it was when committed, or increases the punishment therefor is ex post facto; still the procedure for bringing the offender to justice may be varied from

time to time and applies as well to past offences as to future.

"But so far as mere modes of procedure are concerned, a party has no more right, in a criminal than in a civil action, to insist that his case shall be disposed of under the law in force when the act to be investigated is charged to have taken place. *Remedies must always be under the control of the legislature, and it would create endless confusion in legal proceedings if every case was to be conducted only in accordance with the rules of practice, and heard only by the courts, in existence when its facts arose.* The legislature may abolish courts and create new ones, and it may prescribe altogether different modes of procedure in its discretion, though it cannot lawfully, we think, in so doing dispense with any of those substantial protections with which the existing law surrounds the person accused of crime. A law giving the government additional challenges and another which authorized the amendment of indictments have both been sustained as applicable to past transactions, as any similar law tending only to improve the remedy but working no injustice to the defendant, and depriving him of no substantial right doubtless would be."

Cooley's Constitutional Limitations* 272, 273.
***1 Bishop Crim. Law.* §§ 279, 280.**

This reasoning by analogy may be extended to the case in hand, and the court should consider, *that struck juries have been adopted as a part of the criminal and civil practice of New Jersey, and whether there were or were not struck juries at common law, that same are a constitutional form of jury within the meaning of the New Jersey Constitution*, and a struck jury, as it now exists and has existed in this State, is as fair and impartial a jury as the common law jury. If the struck jury as it now obtains in this state and the legislation therefore, is a mere change in procedure and not in spirit, and if it affords the defendant a fair and impartial jury and if its incidents are in all essen-

tials those of the jury at common law; then it is a jury under the meaning of the United States and the State constitutions.

Thompson v. State of Utah, (supra.)
Moschell v. State (supra.)
Fowler v. State (supra.)

Laws may be passed by the Legislature providing for the method by which jurors may be drawn, as through a board of jury commissioners.

People v. Harding, 53 Mich. 48, 53, 55.

The common law method committed to the sheriff, coroner, or elisors, the entire selection of the jurors. This has been supplanted in all of the states by statutes.

In general the provisions of the statutes in regard to the mode of obtaining jurors are directory and a substantial compliance with the requirements of the law is sufficient. The first step in the organization of the jury is the selection of the list of qualified persons. * * * It is wholly the creature of statute both in England and the United States, and did not exist at common law.

Am & Eng. Enc. Law "Jury and Jury Trial," Vol. 12, pp. 327, 328.

The statutes of New Jersey relating to struck juries above mentioned regulate only the manner by which the trial jury is brought together. Laws of this character are not violative of the federal constitution or statutes. They only regulate matters of procedure. No one of the essential elements of what is commonly understood as a legal jury, either at common law, or by statute, and as derived through the common law, has been taken away by the statutes of New Jersey in question.

Missouri v. Lewis, (supra) 31.
Hurtado v. California, (supra) 535.
Hallinger v. Davis, (supra) 321.
Duncan v. Missouri, 152 U. S. 382.
Hopt v. Utah, 110 U. S. 574, 590.

It is extremely doubtful whether there is any sheriff in the State of New Jersey that has a jury list made up of all the persons liable to jury duty as contemplated by the statutes of said State and from which the general panels are supposed to be made up. But the many laws on the statute books of this State show that the Legislature has regulated the method of drawing, providing the list of jurors and the impanelling of the jury by which the ordinary jury is formed from the general panel.

A statute enacting that the party accused if he should so elect might be tried by the Court, instead of by a jury is not unconstitutional and in conflict with the State constitution, that every person accused shall have a speedy and public trial by an impartial jury and that "the right of trial by jury shall remain inviolate."

State v. Worden, (supra) 369.
State v. Edwards, 16 Vroom (45 N. J. L.) 419.

The constitutional right of a trial by jury is not violated by a statute which provides for the determination by the Court of the degree of crime on a plea of guilty of murder.

State v. Almy, 61, N. H., 428 (22 L. R. A. 744.)
Hallinger v. Davis, 146 U. S. 314-318.

The right which is thus secured by constitutional guarantee must, in its nature be subject to legislative control, to an extent perhaps not easily definable in advance.

1 Bishop Criminal Procedure, Sec. 893.

Although at common law the right to be tried by jury in the case of felony could not be waived.

4 Black. Comm. Sharwood's Ed. 349.

It has been before seen that in England, although it was customary to return twenty-four jurors in criminal cases prior to 3 George II, nevertheless if a larger or smaller number were returned the English Courts on that account did not hold the proceedings invalid.

1 Chitty Crim. Law, 505.

All these changes have been held not to infringe the right of trial by jury. What is there in a struck jury in New Jersey which is so essentially different from the common law trial jury that it is forbidden by our Constitution? AS TO THE NUMBER OF JURORS, it has been seen to be unessential if twelve are sworn. As to the SELECTION OF THE NAMES at common law, it was the sheriff who made the selection. It is the judge of the Court in which the trial is to be had who makes the selection of names in New Jersey, for a struck jury, than which no fairer and more impartial selection could be made. AS TO THE CHALLENGES the reduction in the number of challenges allowed at common law, which was thirty-five, has been held not to be unconstitutional. And it may well be questioned whether it is not a greater privilege to strike off a larger proportional part of a limited number of names of men carefully selected for their probity and intelligence, so that by this process of elimination the best may be left, than to have a great number of challenges against a practically unlimited number of men selected at random.

The constitutional requirement means only that the defendant shall be secure in a trial by a jury of the country, of the proper number, twelve men, properly qualified and returned by the proper officer,

and selected from the body of the county; and that the truth of every accusation against a man, whether preferred in the shape of indictment, information, or appeal should afterwards be confirmed by the unanimous suffrage of twelve of his equals, indifferently chosen and superior to all suspicion.

4 Black. Comm. 350.

In Colt v. Eves, (1837) 12 Conn., 252, it was objected that the jurors in question were not taken from the body of the county, but from a particular section, and that the trial by jury was not preserved inviolate.

Williams, Ch. J. "To preserve the trial by jury inviolate cannot mean that we must pursue the exact course taken in order to collect jurors. If it does what time is to be selected, for they have been constantly altering the qualifications, the exemptions and the mode of summoning jurors, besides the common law required merely, that the jury should come from the vicinage. The statute of 4 and 5 Ann. requires, that the jury should be taken from the body of the county." * * *

"Were this, however, an innovation upon the common law, it would not follow that the trial by jury was not preserved inviolate. It never could have been intended to tie up the hands of the legislature so that no regulation of the trial by jury could be made."

In Beers v. Beers. 4 Conn., p. 539, Hosmer, Ch. J. "An instrument remains inviolate if it is not infringed, and by the violation of the trial by jury, I understand taking it away, prohibiting it, or subjecting it to unreasonable and burdensome regulations, which if they do not amount to a literal prohibition are at least, virtually of that character. It never could be the intention of the constitution to tie up the hands of the legislature so that no change of jurisdiction could be made, and no regulation even of the right of trial by jury, could be had. It is sufficient, and within the reasonable intendment of that instrument, if the trial by jury be not impaired, although it may be subjected to new

modes, and even rendered more expensive if the public interest demand such alteration." 65 N. W. Rep. 196

In *Lommen v. Minneapolis Gas Light Co., 33 Lawyers Report An. p. 437*, the court construed "An act to provide for struck juries," etc.—and held same not in conflict, with the constitutional provision that "the right of trial by jury shall remain inviolate."

A most exhaustive consideration of the law relating to struck juries is given in this case.

Among other statements the court say at page 441: "The question in the present case is, what is a trial by jury within the meaning of the constitution? The expression trial by jury is as old as Magna Charta, and has obtained a definite historical meaning which is well understood by all English speaking peoples; and for that reason no American Constitution has ever assumed to define it. We are therefore relegated to its history at common law to ascertain its meaning. The essential and substantive attributes and elements of jury trial are and always have been number, impartiality and unanimity. The jury must consist of twelve, they must be impartial and indifferent between the parties and their verdict must be unanimous. It cannot be claimed that the act under consideration affects either the first or third of these essential attributes of a jury trial. If it affects any of them, it must be the second, viz: impartiality. *No court ever held or intimated that, in order to preserve the right of trial by jury inviolate it is necessary to continue the particular method of selecting jurors in force at the time of the adoption of the constitution.* On the contrary, it has always been held that the method of selection is entirely within the control of the legislature, provided only that the fundamental requisite of impartiality is not violated."

At page 442, the court further say: "Special or struck juries were well known to the common law, their origin being so ancient that its date cannot be ascertained."

The objection that a defendant is deprived of per-

emptory challenges, is also considered at page 441—of this case—and the legislation in the different States is examined, and the court at page 443, in conclusion say:

"In view of such a consensus of opinion on the part of the legislatures, and impliedly of the courts and bar of the country, that statutes of this kind do not impair the common law right of trial by jury as known and understood in American constitutional law, we would not be warranted in holding this act unconstitutional."

In 1896 a law was passed in New York State (Chapter 378) providing for a special jury in criminal cases. In October 1898 a motion was made for a special jury under this law by the District-Attorney of New York County, to try one Frank Dunn charged with the crime of murder. The law provided for a special jury in criminal cases in each county of the state having a certain population, and for the mode of selecting and procuring such special juries through a special jury commissioner, and regulated and prescribed the duties of such commissioner. An appeal was taken from the order for a special jury and the case was decided January 10, 1899 by the New York Court of Appeals *157 N. Y. Reports (Court of Appeals E. H. Smith 11). 528.*

It was claimed the law was unconstitutional and that it was violative of the right of trial by jury. The New York constitution (Art. 1, Sec. 2) provides that "The trial by jury in all cases in which it has been heretofore used shall remain inviolate forever."

The court held the act not to be unconstitutional, and that the act did not work a deprivation of life, liberty or property "without due process of law," and that special juries were known to the common law from early times. The court reviews the system of trial by jury at page 533, and at page 535 says: "From this brief inquiry we would seem justified in saying that special as well as struck juries were resorted to at common law, and that the mode of the selec-

tion of jurors was a matter for legislation, and again at page 536, "whether we examine the question in the light of authority, or of reason; we find that the object aimed at under the common law, and which the constitutional provision must be deemed to have intended, is the obtaining of an impartial jury of twelve men and how that shall be accomplished is a matter within legislative regulation."

This last case cites the case of *Fowler v. State* (*supra*) and upholds the principles laid down in that case and the case of *Moschell v. State* (*supra*) and in the present case now under review.

IV.

CONCLUSION.

All the other objections raised by the plaintiff in error in his assignment or statement of errors, filed in this cause are general in form. Where they relate to alleged violations of the Constitution of the United States or amendments thereto, (exclusive of the fourteenth amendment,) they do not apply to this case in this Court, as such amendments as may be claimed are applicable, relate only to the Federal Government, and not to the States.

> ***Barron v. Baltimore, 7 Peters 243, 247.***
> ***McElvaine v. Brush, 142 U. S. 158.***
> ***Fourteenth Amendment to Constitution of U. S. Guthrie 3, 22, 58.***

The objections relating to errors in the procedure of the trial court in that the jury was impanelled when certain of the struck jury were not returned served by the sheriff, and others, whose names, together with the names of absent struck jurors were placed in the box and called when they did not appear, and the trial court not sustaining the challenge to the array, are of no force in this court, as such procedure was

in conformity to Section 76 (*supra*) of the statutes in question, and the uniform practice of the courts of New Jersey.

Smith v. Smith, 23 Vroom (52 N. J. L.) 207.
Patterson v. State, 19 Vroom, (48 N. J. L.) 381.

No application was made to postpone the case until two of the jurors had been called and sworn, and a postponement was then impracticable. During the calling of the jury some were excused by counsel and others were permitted to stand aside. After eleven jurors had been secured, the Court permitted the names of those permitted to stand aside to be again put in the box. This was in accordance with the practice. The twelfth juror was obtained from the jurors whose names were put back in the box. The jury who tried the case was thus obtained from the panel selected and certified by the Court.

The course pursued by the trial court was a matter of procedure. The questions related to the construction of the State laws and practice only, and the decision of the trial court, affirmed by the highest Appellate Court of New Jersey, in this case, even if erroneous, will prevail in this court. There is nothing in such errors raising a federal question under Section 709, U. S. Statutes, or the Fourteenth Amendment (*supra*), and this court follows the decisions of the State Court.

McElvaine v. Brush, 142 U. S. 155.
McNulty v. California, 149 U. S. 647.
Kohl v. Lehlbach, (supra) 299.
Lambert v. Barret, 157 U. S. 697, 699.
In re Converse, (supra) 631.

It is respectfully submitted that the judgment of the State Court should be affirmed.

JAMES S. ERWIN,
Attorney and Counsel for Defendant in Error, and Prosecutor of the Pleas of Hudson County, N. J.

N. J. Court of Errors and Appeals.

NOVEMBER TERM, 1898.

JAMES K. BROWN,
Plaintiff in Error,

vs.

THE STATE OF NEW JERSEY,
Defendant in Error.

OPINIONS FILED IN THE CAUSE.

Error to Court of Oyer and Terminer, Hudson county; before JUSTICE LIPPINCOTT.

James K. Brown was convicted of murder and he brings error. Affirmed.

For the Plaintiff in Error, WILLIAM D. DALY.

For the Defendant in Error, JAMES S. ERWIN.

The Opinion of the Court was delivered by DEPUE, J.

DEPUE, J. The plaintiff in error was indicted for the murder of Charles Gebhardt, a police officer of the city of Hoboken. The indictment was found in the court of oyer and terminer of the county of Hudson. It contained two counts: First, the statutory form prescribed by section 45 of the act regulating proceedings in criminal cases. Revision, p. 275 (P. L. 1898, p. 866, § 36). The second count is in the common-law form, charging the killing to have been done "willfully, unlawfully, feloniously, deliberately, premeditatedly and with malice aforethought." The contention is that, in order to charge the act of killing for which the accused was

put on trial, the allegation should have been of the killing of a police officer. This contention is without substance. An indictment in the statutory language that the defendant did "willfully, feloniously, and with malice aforethought kill and murder the deceased," is sufficient. Graves v. State, 45 N. J. Law, 203, 347; Titus v. State, 49 N. J. Law, 36, 7 Atl. 621. At common law, and independently of our statute, an indictment for killing an officer might well be in form general, that the prisoner felonice, voluntarie, et ex malitia fua praecognitia, etc., without alleging any special matter. Mackalley's Case, 9 Coke, 67.

The accused was tried before a struck jury, and was convicted of murder of the first degree. The statute under which the jury in this case was struck confers on the supreme court, court of oyer and terminer, and court of quarter sessions, or on any judge thereof, on motion on behalf of the state or the defendant in any indictment, power to order a jury to be struck for the trial thereof, and provides that upon making such order the jury shall be struck, served, and returned in the same manner as in the case of struck juries ordered in the trial of civil cases except as by the act provided. P. L. 1898, p. 894, § 75. The order for a struck jury in this instance was made by the court on the application of the prosecutor. The method in which the jury is struck in civil cases is found in the Revision, and is substantially the same as the method of striking juries in England. The party applying for such struck jury is required to give six days' previous notice to the adverse party or his attorney, and to the judge, sheriff, or other officer, of the time and place of striking such jury, at which time and place the judge shall, in the presence of the parties or their agents or attorneys, or such of them as shall attend for that purpose, select and transcribe the names of 48 persons so qualified, with their places of abode, "as he shall think most impartial and indifferent between the parties, and best qualified as to talents, knowledge, integrity, firmness and independ-

ence of sentiment, to try the said cause;" and thereupon the party applying for such jury, his agent or attorney, shall first strike out one of the said names, and then the adverse party, his agent or attorney, shall strike out another, and so on alternately, until each shall have stricken out 12; but if the adverse party shall not attend such striking, nor any person in his behalf, then the judge shall strike for him; and when each shall have stricken out 12, as aforesaid, the remaining 24 shall be the jury to be returned to try the said cause, which list shall be delivered to the sheriff or other officer who ought to summon such jury, together with the venire facias, by the person applying for such jury, etc., at least 10 days prior to the day appointed for the trial of said cause; and such sheriff or other officer shall thereupon annex the said list to the said venire facias, and return the same as the panel of the jury to try the said cause, and summon them according to the command of the writ. Revision, p. 527, §§ 18–26; 2 Gen. St. p. 1849. The act of 1898, in its modification of the law relating to struck juries in criminal cases, provides for the selection of 96 persons in the list from which the jury is to be struck, and provides that 24 names shall be struck by the prosecutor and by the accused, respectively, in the usual manner, and the remaining 48 names shall be returned as the panel of jurors, and the names placed in the box by the sheriff, and the jury for the trial of the case be drawn in the usual way. P. L. 1898, p. 895, § 76. This act further provides that on the trial of any indictment for which a struck jury shall be summoned and returned, five peremptory challenges shall be allowed to the defendant, and the same number to the state. Id. p. 896, § 81. By 22 Hen. VIII. c. 14, persons indicted for petit treason, murder or felony were admitted to challenge peremptorily 20 of the jurors returned. This statute was in force in England at the time of the Revolution. By act of the legislature passed in 1795, it was provided that every person in-

dicted for treason, murder, or other crimes punishable with death, or for misprision of treason, manslaughter, sodomy, rape, arson, burglary, robbery, or forgery, was admitted to challenge peremptorily 20 of the jurors; and it was further provided that neither the attorney general nor any person prosecuting for or in behalf of the state should be admitted in any case to challenge any juror without assigning a cause certain, and that the privilege of peremptorily challenges should not be allowed to offenders in any cases except such as are specified above. R. L. p. 184. These provisions are contained in section 6 of the Revision of 1845, with the addition thereto of perjury and subornation of perjury. Rev. St. p. 294. Struck juries were allowed in England in the trial of civil cases from an early period, and by 3 Geo. II. c. 25, were authorized in criminal cases on the trial of an indictment or information for any misdemeanor or information in the nature of quo warranto. The statute did not apply to indictments for treason or felony, and consequently a special jury in England was not allowed in cases of treason or felony. 21 Vin. Abr. p. 301, tit. "Trial" (D, e, 2). This statute was embodied in the act of 1797 as section 14, with the proviso that it should "not extend to any indictment for any offense where the party is entitled to challenge peremptorily or without cause shown" (R. L. p. 313), and was included in the act concerning juries and verdicts in the Revision of 1845 (Rev. St. p. 968). In the Revision of 1874 it was embodied in the act concerning juries, without the exception contained in section 14 of the act of 1797, and the right to order a struck jury was thereby conferred on the trial of any indictment. Revision, p. 527, § 12. The statutory provisions with respect to struck juries as contained in the Revision of 1874, were retained in the act of 1898, with modifications with respect to the number of jurors to be selected, and the number to be struck by the prosecutor and the accused, respectively, and also allowing to the prosecutor and the accused each five peremp-

tory challenges. P. L. 1898, pp. 894—896, §§ 75—81. Peremptory challenges allowed to the accused on the trial of criminal cases are now regulated by sections 80 to 83, inclusive, of the act of 1898. Every person indicted for treason, murder, etc., is admitted to challenge peremptorily 20 of the jurors summoned, and the state is entitled to challenge peremptorily 12; and on the trial of an indictment where 20 peremptory challenges are not allowed, the defendant and also the state are entitled each to challenge peremptorily 10 of the general panel of jurors summoned and returned. These two provisions do not apply to trials where a struck jury is ordered. In such cases the number of peremptory challenges allowed as the jury is drawn from the box is limited to 5 by the defendant, and the same number by the state. The record shows that application was made to the court by the prosecutor of the pleas for a struck jury, and that the court granted the motion, and fixed September 12th as the time for striking, and directed notice to be given for that day. On that day the counsel of the prisoner appeared, and objected to the striking of the jury on the ground that the statute under which the jury was to be struck was unconstitutional and void. The court overruled the objection, and exception was taken.

By Const. 1776, art. 22, it was provided "that the inestimable right of trial by jury shall remain confirmed as part of the law of this state without repeal forever." The provisions on this subject in Const. 1844, art. 1, § 7, are as follows: "The right of a trial by jury shall remain inviolate, but the legislature may authorize the trial of civil suits when the matter in dispute does not exceed fifty dollars by a jury of six men." Section 8 provides that "in all criminal prosecutions the accused shall have the right to a speedy and public trial by an impartial jury; to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor,

and to have the assistance of counsel in his defense."

Two grounds are alleged in the brief of the counsel of plaintiff in error for the contention that the act of 1898 is unconstitutional: First, because the crime with which he was charged was a felony at common law, and a struck jury could not be had at common law in cases of felony, and hence under our constitution the legislation for struck juries in capital cases is unconstitutional; second, that, being tried by a struck jury, the accused was deprived of his common law right of 20 peremptory challenges.

Trial by jury, as the means of determining questions of fact, is of great antiquity. Its origin, notwithstanding the investigations to which the institution has been subjected, still remains in obscurity. In the Mirror of Justice satisfactory evidence is furnished that in criminal cases in the time of King Alfred trial by jury was trial by a jury of 12 men, who were sworn, and whose verdict was required to be by the concurrence of all. It is said that King Alfred caused 44 justices in one year to be punished for false judgment. In the enumeration given it is stated that he punished Cadwine "because that he judged Hackwy to death without the consent of the jurors, whereas he stood upon the jury of twelve men, and because three would have saved him against nine. Cadwine removed the three and put others upon the jury, upon which Hackwy put not himself." He punished Markes because he judged During to death by twelve men who were not sworn." "He punished Freburne because he judged Harpin to die, whereas the jury were in doubt as to their verdict; for in doubtful cases one ought rather to save than to condemn." Mirror Just. c. 5, par. 108 (3), (7), (15). The most ancient traces of trial by jury, qualified by an oath, and consisting of 12 men, says Selden, the antiquarian, "are to be found in the law of the King Ethelred, which provided that in every hundred let there be a court; then let twelve freemen of mature age together with their foreman swear upon the holy

relics that they will condemn no innocent and absolve no guilty person." Selden's Discourses (Bacon's Ed.) c. 6, p. 37. Mr. Justice Wilson, of the supreme court of the United States, in his lectures on the law, refering to the evidence on this subject, says that "to King Alfred the world is indebted for the unanimous duodecemiral judgment." 2 Wilson's Works, pp. 327-349. Mr. Finalson, in his note to 1 Reeve, Eng. Law, p. 474, says: "It is certain that in Alfred's time there was trial by jury in criminal cases, and equally certain that jurors in those days were witnesses, and that if there were no witnesses, as there could hardly be in many criminal cases, as murder, there could be no trial by jury, and therefore the ordeal was resorted to in default of witnesses: * * * that there can be no doubt that trial by jury very gradually superseded every other mode of trial." He also refers to a passage in the Mirror (temp. Edw. 1.) "which complains that the people were not allowed trial by the miracle of God, as the ordeal was called." Sir Edward Coke says: "This trial of the fact is very ancient, and was the law before the Conquest." 1 Co. Litt. 155b. Mr. Reeve says that it was not till the reign of Henry II. (which was before Magna Charta) that the trial by jurors became general, and that the progress made in bringing this trial into common use was attributed to a law enacted by that king, which ordained that all questions of seisin of land should be tried by a recognition of 12 good and lawful men, sworn to speak the truth. The proceeding was called "per assisam" and "per recognitionem," and the persons composing it were called "juratores, jurati, recognitores assisae," and collectively "assisa" and "recognito." The author further says the oath of 12 jurors was resorted to in other instances than those provided for by this law, and then this proceeding was said to be "per juratam patriæ," or "vicineti, per inquisitionem, per juramentum legalium hominum." This proceeding by a jury was no other than that which had been mentioned as having gained ground by usage or custom. It was

sometimes used in questions of property, but it would seem more frequently in matters of a criminal nature. 1 Reeve, Eng. Law, pp. 139, 140. It is conceded by all who have written on this subject that before Magna Charta trial by jury was a trial before a tribunal established for the determination of matters of fact, consisting of 12 men whose decision could only be by the consent of all. The words "trial by jury" had a definite and fixed meaning at the time of Magna Charta, as well settled as any other term known to the common law. Consequently, when by Magna Charta it was "granted also and given to all the freemen of our realm, for us and our heirs forever, these liberties underwritten," among which are, "no freeman shall be taken or imprisoned, nor disseised, nor outlawed, nor banished, nor in any wise be damaged; nor shall the king send him to prison by force, except by the judgment of his peers or by the law of the land,"—trial by jury, as previously known to the law, was comprised in the phrase, "legal judgment of his peers or by the law of the land." Id. p. 246, note. The qualification of jurors, and the means by which they were to be selected and impanelled, constituted no part of the essential features of trial by jury at common law. Thus, in the earlier period jurors found their verdicts upon their own knowledge of the matters of fact, and consequently they were frequently called 12 witnesses, and their verdicts the testimony of 12 credible men; and they were selected from the villa or place where the offense was committed or the dispute arose, and it was a good cause of challenge to the array that there were not upon the panel returned by the sheriff a sufficient number of hundredors. Arundel's Case, 6 Coke 14. This practice had fallen into disuse, without being changed by statute, until 24 Geo. II. c. 18, by which jurors were required to come from the body of the county, and a want of hundredors was no longer a cause of challenge. By the common law, jurors were required to be freeholders, whose possessions in the

whole amounted yearly to above the sum of 500 marks. Fortes, c. 29, p. 67. By 2 Hen. V. c. 3, on the trial of a criminal case it was provided that jurors should have lands and tenements of the value of 40 shillings per annum. By subsequent statutes the value of juror's freeholds was changed from time to time, and and in cities and boroughs a citizen worth £40 in personal estate was qualified as a juror, though he had no freehold. 2 Hale, P. C. 272-274. By the common law the king was entitled to challenge peremptorily any number of jurors, without alleging any reason other than "Quod non boni sunt pro rege." By 33 Edw. I. St. 4, the right of peremptory challenge was taken from the king. By 22 Hen. VIII. c. 14, § 7, made perpetual by 32 Hen. VIII. c. 3, the number of peremptory challenges permitted to the accused arraigned for petit treason, high treason, murder, or felony was reduced to 20. This right of peremptory challenges was allowed only in favor of life, and was never allowed to a person accused of a mere misdemeanor. 1 Chit. Cr. Law, 535. At common law the accused had his challenges for cause without limit, as well as his peremptory challenges. Fortes, c. 27. Parliament never interfered with challenges for cause. Hence it became the common law that the accused had a right to trial by a common law jury and by an impartial jury, as at common law.

The above, in brief, is a statement of the condition of the English law, so far as is pertinent to the present subject, at the time of the Declaration of Independence. It will be observed, from the course of legislation in England prior to that time, that the subject of qualifications of jurors, as well as the right of peremptory challenges, was a matter of legislation, which was exercised in one instance, at least, to reduce the number of such challenges previously allowed to an accused. Although trial by jury, as that expression was understood at the time of Magna Charta, was guaranteed by that instrument, and secured to Englishmen as an inalienable right, the mode

in which jurors were selected, their qualification, and extent of the right of peremptory challenges were matters committed to the power of parliament. It would have been an intolerable grievance to have fixed in the constitution of England unalterably all the details connected with trial by jury which were suitable to a prior age, but unsuited to later times. In this country, where the constitutions provide that the right of trial by jury shall remain confirmed as part of the law of the land, or the right of trial by jury shall remain inviolate, the words "trial by jury" import a trial by a jury of 12 men, impartially selected, who must unanimously concur in the guilt of the accused. Consequently, under such constitutional provisions an act of the legislature which provided for a jury in criminal cases of less than 12, or a verdict by the concurrence of less than that number, would be unconstitutional. Thompson v. Utah, 170 U. S. 343–349, 18 Sup. Ct. 620; Work v. Ohio, 1 Benn. & H. Lead. Cr. Cas. 482. The provision in our constitution (article 1, § 8) that the accused should have a right to a speedy and public trial, by an impartial jury, secured to the accused a right to a trial by an impartial jury, by an express constitutional provision. The means by which an impartial jury should be obtained are not defined. In neither of the constitutional provisions on this subject is there any requirement with respect to challenges, or to the qualifications of jurors, or the mode in which the jury shall be selected. These subjects were left in the discretion of the legislature, with no restriction or limitation, except that the accused should have the right to be tried by an impartial jury. The provisions on this subject in Magna Charta, as well as those in our constitution, apply to criminal cases of all grades, —misdemeanors as well as common-law felonies. If 20 peremptory challenges are essential to secure an impartial jury, then there has not been in England, nor is there in this state, any constitutional mode of trying criminal cases of a grade

less than those enumerated in the statute of Hen. VIII. and in the act of 1795. It seems to me that it is inconceivable that a jury should be an impartial jury in the trial of an indictment, say, for having burglars' tools with intent to use them, the penalty for which is imprisonment for the term of seven years, and not an impartial jury on prosecution for burglary actually committed, the punishment for which is seven years, or on an indictment for entering with intent to steal, etc., the penalty for which is also seven years, or an impartial jury in the trial of an indictment for an assault and battery with intent to commit murder, the punishment for which is imprisonment for seven years, and not an impartial jury in the trial of an indictment for manslaughter, etc., the penalty for which is ten years. And yet, if the act of 1795 has become so imbedded in the constitution of this state as to fix a constitutional right to 20 peremptory challenges in an accused upon an indictment for murder, the same constitutional right will inhere in persons accused of any one of the offenses enumerated in that act. It cannot, therefore, be said that such peremptory challenges are at this time allowed in favorem vitæ.

In the treatises on this subject, as well as in the decisions of the courts, there is a consensus of opinion in defining right of trial by jury under constitutional provisions such as ours as it is here defined with respect to the legislative power over trial by jury. An act diminishing the number of a jury, or altering any of its essential features, as, for instance, dispensing with unanimity, or depriving a party of challenges for cause—the purpose of which is to exclude jurors who are not impartial—would be clearly unconstitutional; but it is otherwise of a law merely providing the mode of securing a trial by jury. "Although by the common law at the adoption of the constitution a person charged with a capital offense could challenge twenty jurors peremptorily, yet it has been held that a law reducing the number of such

challenges to twelve was not unconstitutional, or an infringement of the sacred right of trial by jury." 1 Benn. & H. Lead. Cr. Cas. 495, 496. "The legislature has the power to confer the right to challenge peremptorily upon the parties litigant in civil actions and proceedings, and the state and the accused in criminal cases; and by reason of the power so vested, and so long as the right to trial by jury is preserved, and means are provided whereby impartial jurors can be obtained, it may make changes in existing laws, and increase or decrease the number of challenges to which either the state or the defendant may be entitled." 12 Enc. Pl. & Prac. 478; 1 Bish. Cr. Pro. 941.

The constitution of New York preserves the trial by jury in all cases in which it had been theretofore used. In Walter v. People, 32 N. Y. 147-159, which was on an indictment for murder, the question was whether an act which conferred on the people the right to challenge five of the persons drawn as jurors peremptorily was constitutional; there being no right on the part of the prosecution to challenge peremptorily when the first constitution of the state was adopted. The court sustained the constitutionality of the act, and in doing so used this language: "This certainly is no limitation of or restriction upon the legislative power, except as to the right guaranteed, viz. a jury trial in all cases in which it had been used before the adoption of that instrument. I am not aware of any other constitutional provision that may be supposed to have the remotest bearing upon the question. Trial by jury cannot be dispensed with in criminal cases, but it is obviously within the scope of legislation to regulate such trial. I entertain no doubt that it is entirely competent for the legislature to declare that either the people or the accused may have their challenges without assigning cause, and to limit the number of them. The subject of peremptory challenge has always been under legislative control, and it is only within a comparatively recent period that the

right has been extended even to the accused in a minor class of criminal offenses. Even if it were a right given by common law, it could be restrained, limited, or withheld altogether, at the legislative will." In Stokes v. People, 53 N. Y. 164, 171—173, which was a writ of error on a conviction for murder, the question was as follows: At common law, a juror having formed or expressed an opinion conclusively proved a want of impartiality, and excluded the juror, without inquiry as to whether this would influence his actions as a juror. An act of the legislature of New York provided that the previous formation or expression of an opinion or impression in reference to the circumstances upon which any criminal action is based, or in reference to the guilt or innocence of the prisoner, or a present opinion or impression in reference thereto, should not be a sufficient ground of challenge, provided the person proposed as a juror should declare on oath that he verily believes that he can render an impartial verdict according to the evidence submitted to the jury on the trial. The question was as to the constitutionality of the act of the legislature. The act was sustained, and the court, in its opinion, held: "The position of the counsel for the accused is that the right of trial by jury is secured to persons accused of felony, by the constitution, and that this secures the further right of trial by an impartial jury. We shall assume the correctness of the latter position. Any act of the legislature providing for the trial otherwise than by a common-law jury composed of twelve men would be unconstitutional and void, and any act requiring or authorizing such a trial by a jury partial or biased against either party would be a violation of one of the essential elements of the jury referred to in, and secured by, the constitution. * * * It will be seen that the intention of the act was not to place partial jurors upon the panel, but that great care was taken to prevent such a result. The end sought by the common law was to secure a panel that would impartially hear the evidence, and render a verdict there-

on uninfluenced by any extraneous considerations whatever. * * * While the constitution secures the right of trial by an impartial jury, the mode of procuring and impanelling such jury is regulated by law, either common or statutory,—principally the latter; and it is in the power of the legislature to make from time to time such changes in the law as it shall deem expedient, taking care to preserve the right of trial by an impartial jury."

The courts of Massachusetts and Connecticut, as well as courts of other of our sister states, have held that the legislature may confer upon the prosecution a right of challenge on the trial of capital offenses that did not exist when the constitution was adopted. Com. v. Dorsey, 103 Mass. 412; State v. Hoyt, 47 Conn. 518. The constitution of Pennsylvania provides "that the trial by jury shall be as heretofore and the right shall remain inviolate." Article 1, § 6. A statute which conferred upon the state challenges, where challenges were not allowed at the formation of the constitution, was held to be constitutional. Mr. Justice Thompson, delivering the opinion of the court, said: "There is no violation of the right, unless the remedy is denied, or so clogged as not conveniently to be enjoyed. * * * It would be difficult to prove that a limited number of such challenges by the commonwealth necessarily deprives the prisoner of any of his rights. Impartiality is presumed, and is the right of both sides in a criminal trial. To attain this was undoubtedly the object of allowing challenges at all. Whatever, therefore, tends to this end, and no more, surely takes away no right." Warren v. Com., 37 Pa. St. 45; Hartzell v. Com., 40 Pa. St. 462.

In Proff. Jury, § 106, the doctrine is stated in these words: "The legislature may limit the number of peremptory challenges, even in capital cases, without infringing on the constitutional right; for this right is to have twelve free and lawful men, who are impartial between either party, who will by a unanimous verdict find the truth of the issue; and any legislation,

therefore, which merely points out the mode of arriving at this object, but does not rob it of any of its essential ingredients, cannot be considered an infringement of the right." In Thomp. & M. Juries, § 163, it is said: "The subject of peremptory challenge has always been under legislative control, and it has been held by a long and unbroken line of decisions that the legislature has power at all times to increase or diminish the number of peremptory challenges to be allowed to the state or defendant in criminal cases." The subject is discussed in the notes to Work v. Ohio, 1 Benn. & H. Lead. Cr. Cas. 482, 492, 496, and the power to increase or diminish the number of peremptory challenges allowed to the state and the defendant, respectively is affirmed.

In Hayes v. Missouri, 120 U. S. 68, 7 Sup. Ct. 350, Mr. Justice Field, in discussing the office of peremptory challenges, used this language: "The constitution of Missouri, and, indeed, every state of the Union, guarantees to all persons accused of a capital offense, or of a felony of lower grade, the right to a trial by an impartial jury, selected from the county or city where the offense is alleged to have been committed; and this implies that the jurors shall be free from all bias for or against the accused. In providing such a body of jurors, the state affords the surest means of protecting the accused against an unjust conviction, and at the same time of enforcing the laws against offenders meriting punishment. To secure such a body, numerous legislative directions are necessary, prescribing the class from which the jurors are to be taken, whether from voters, taxpayers and freeholders, or from the mass of the population indiscriminately; the number to be summoned from whom the trial jurors are to be selected; the manner in which their selection is to be made; the objections that may be offered to those returned, and how such objections shall be presented, considered and disposed of; the oath to be administered to those selected; the custody in which they shall be kept during the progress of the

trial; the form and presentation of their verdict; and many other particulars. All these, it may be said in general, are matters of legislative discretion. But to prescribe whatever will tend to secure the impartiality of jurors in criminal cases is not only within the competency of the legislature, but is among its highest duties. It is to be remembered that such impartiality requires, not only freedom from any bias against the accused, but also from any prejudice against his prosecution. Between him and the state the scales are to be evenly held. * * * In this country the power of the legislature of a state to prescribe the number of peremptory challenges is limited only by the necessity of having an impartial jury."

The cases cited affirm the constitutionality of statutes conferring upon the prosecution a right of peremptory challenges, or increasing the number of challenges beyond those allowed at the time of the adoption of the constitution. The act authorizing a struck jury in criminal cases is not unconstitutional, in that it allows the state a right to strike from the list an equal number of persons selected as jurors, and to challenge an equal number with the defendant at the time the jury is impanelled. The principle on which these decisions were rested, and which was affirmed as the ground of decision, applies as well to statutes which reduce the number of challenges allowed to the accused, provided an impartial jury is secured. It was accordingly held in Dowling v. State, 5 Smedes & M. 664, that a statute that reduced the number of peremptory challenges allowed to a prisoner to 12 in capital cases, was not an infringement of the clause of the constitution which provided that the right of trial by jury should remain inviolable. I find on examination in several of our sister states, whose jurisprudence is founded upon the common law, and with constitutional provisions on the subject of trial by jury in criminal cases similar to ours, the number of peremptory challenges in the trial of capital cases has been reduced below the number that ex-

sted in England at the time of the separation. In California, in capital cases, or where the punishment is imprisonment for life, the defendant has 10; the state 5. In Colorado, the people and the accused are entitled each to 15 in capital cases. In Florida, in capital cases, the state has 6; in cases not capital, the state and the defendant have 4 each. In Kansas, in capital cases, or where the punishment is imprisonment for life, the defendant has 12; the state, 6. In Maine, in capital cases, the defendant may challenge 10 while the jury is being formed, and 1 more after it is complete. In Mississippi, in capital cases, the defendant has 12; the state, 6. In Nebraska, in capital cases, the defendant has 16; the state, 3. In Nevada, in capital cases, the defendant has 10; the state, 5. In Oregon, in capital cases, or where the punishment is imprisonment for life in the penitentiary, the defendant has 12; the state, 6. In Vermont, in all criminal prosecutions in the county court, the defendant has 6; the state has 2. In Virginia, upon the trial of a felony, a panel of 16 is formed, from which the defendant may strike 4. The state has no right of peremptory challenge. Thompson & M. Juries, § 165. Notwithstanding these departures from the common law, I do not find that the power of the legislature to limit or reduce the number of peremptory challenges to the accused was ever contested, except in Dowling v. State, supra, with the result above set out. In State v. McClear, 11 Nev. 39, the constitutionality of a jury law of 1875 was under consideration. The act in question permitted 12 peremptory challenges to the accused and to the state in offenses punishable with death or imprisonment for life, and, in effect, deprived the accused of challenges for cause. The court held the act in this respect to be unconstitutional, that it was not within the power of the legislature to deprive a citizen accused of crime of the right to challenge a juror for actual bias. This decision proceeded on the ground that the constitution secured to the accused a trial by an impartial

jury, and that a statute which impaired the right of challenging for a cause touching the impartiality of a juror was void. A distinction was made in the case between challenges for bias, which exist as a matter of right, and peremptory challenges, which were allowed by favor of the legislature, and had always been regulated by statute.

The course of legislation in England is in affirmance of the right of parliament to reduce the number of peremptory challenges allowed to an accused, as not being an invasion of the right of trial by jury secured by Magna Charta. Before Magna Charta, any man accused of felony or treason was allowed to challenge for cause without limit, and also to challenge five and thirty of the jurors without assigning cause. Fortes. c. 27, p. 12; 2 Trial per Pais, 600. Such was the condition of the law of England at the time of Magna Charta, and continued to be until 22 Hen. VIII. c. 14, which enacted "that no person arraigned for petit treason, murder or felony be admitted to any peremptory challenge above the number of twenty;" and by 33 Hen. VIII. c. 23, it was enacted "that in cases of high treason or misprision of treason peremptory challenge should not be allowed." The statute of 1 & 2 P. & M. c. 10, enacted "that all trials for any treason shall be according to the due course of the common law;" and thereupon it was held that the common-law right of challenging peremptorily 35 jurors was restored in cases of treasons. 3 Co. Inst. 27–227; 1 Chit. Cr. Law, 534; 1 Co. Litt. 156b; 2 Hale. P. C. 268, 269. By the common law from time immemorial before Magna Charta, and for upwards of three centuries after that charter of liberties, 35 peremptory challenges were allowed the accused in treason or felony. The statutes of Hen. VIII. wholly deprived persons accused of treason of peremptory challenges, and reduced the number of peremptory challenges allowed on the trial of indictments for felony from 35 to 20. Magna Charta is styled the "Charter of the Liberties of Eng-

lishmen," and occupies in the constitutional law of England the place of our written constitution, federal and state; and any act of parliament contrary to Magna Charta is as completely invalid as acts of the legislature are which contravene constitutional limitations. 3 Co. Inst. 111; 1 Co. Litt. 81a; 2 Inst. 108. There is not in any decision or treatise on the law of England any scruple expressed with respect to the validity of those statutes passed after Magna Charta which reduced the number of peremptory challenges below those which were previously allowed at common law. From Henry VIII. until the Revolution the principle was recognized, as part of the common law of England, that trial by a jury consisted in a trial by a jury of 12 men, who should unanimously concur in the verdict, and that the number of peremptory challenges allowed by the common law, or granted by statutes from time to time, were matters within the control of parliament. Such was the common law of England at the Revolution. With full knowledge of the course of legislation in England, and also of the control permitted to parliament over the subject of peremptory challenges, it was declared in our first constitution that the right of trial by jury should remain confirmed as part of the law of this colony, without repeal, forever; and in the constitution of 1844, that the right of trial by jury should remain inviolate. And a clause was added that in all criminal prosecutions the accused should have a right to a speedy and public trial by an impartial jury. In State v. Fox, 25 N. J. Law, 589, Chief Justice Green, referring to the clause just quoted, said: "This clause confers upon defendants in criminal cases no new right. It invests with the constitutional sanction what was previously a common-law right. Every criminal is entitled at common law to a trial by an impartial jury. The question still remains, what constitutes impartiality, or, rather, what is the test of evidence of that bias or partiality which disqualifies the juror? This must be settled by common-law principles. The ques-

tion has undergone such repeated and elaborate discussion, that no new light can be hoped for. A further discussion would be misplaced. It is proposed simply to advert to some of the leading cases in the books, and state briefly the grounds on which the decision must rest." 1 Dutch, p. 589. The chief justice then proceeded to discuss the grounds of challenge for cause,—the method provided by the common law by which jurors who were not impartial were excluded from the jury. It will be observed, also, that in Stokes v. The People the legislature had modified the grounds on which at common law a juror on a challenge for cause, would be disqualified to become a juror in the trial of a criminal case, and that legislative action was affirmed by the court. The authorities cited exhibit unanimity in judicial opinions affirming the principle that the duty of providing means of obtaining an impartial jury marks the limit of legislative control over the incidents of trial by jury, including the right of challenges.

Struck juries, under the name of "special juries," were resorted to in the English courts at an early period for the purpose of obtaining jurors in the trial of civil cases. In Rex. v. Edmonds, 4 Barn. & Ald. 476, which was an indictment for conspiracy, tried before a special jury, Chief Justice Abbott said: "It cannot be, or at least has not hitherto been, ascertained at which time the practice of appointing special juries for the trials at nisi prius first began. It probably arose out of the practice of appointing juries for trials at the bar of the courts at Westminster, and was introduced for the better administration of justice, and for securing the nomination of jurors duly qualified in all respects for their important office." By our statute the judge is required to select the names of such persons qualified as jurors "as he shall think most impartial and indifferent between the parties, and best qualified, as to talents, knowledge, integrity, firmness, and independence of sentiment, to try the

said cause." The striking of the jury is upon notice to the prisoner or his counsel. It takes place in the presence of the sheriff and of the prosecutor, and of the accused and his counsel, if they desire to be present. From the 96 names selected, the prisoner or his counsel is permitted to strike 24. The 48 names that remain after the prosecutor and the defendant have completed the striking are returned as the panel from which the jury of 12 men is to be selected. The list from which such panel is to be selected is in the hands of the defendant or his counsel at least 12 days before the impanelling of the jury. In this instance the list was in the hands of the counsel of the accused from September 13th to October 3rd, when the trial began. At the time of the selection of the jurors the accused is allowed to reject 24 names peremptorily, and he is allowed the right to challenge for cause without stint. Ample time is afforded to him between the striking of the panel of jurors to be returned and the time of drawing the trial jury to enable counsel to ascertain grounds of objection to individual jurors which would be available upon a challenge for cause, and the defendant is allowed in addition 5 peremptory challenges as the names are drawn from the box. As the right of challenge is not a right to select, but to exclude, the accused on the striking of the jury has power to exclude 24 at will, and at the drawing of the names from the box to form the jury of 12 he has in addition 5 peremptory challenges. It may be, as contended by the counsel of the accused, that the striking of 24 names from the list of jurors is not equally advantageous with a challenge in open court, upon a view of the jurors, as their names are called from the box; but the legislative power over challenges is not limited by such a consideration.

The power of the legislature is put at issue by this exception. Conceding to that department of the government its legislative functions, which, when within constitutional limitations and

restrictions, are beyond the control of the judiciary, the court cannot interfere with its discretion on considerations of policy or abstract justice. A clear case of the infringement or invasion of some constitutional right must be disclosed, to justify the intervention of the courts to nullify an act of the legislature. The only restriction on the power to legislate on this subject springs from the duty to secure an impartial jury; and it cannot be affirmed that the legislature has exceeded constitutional limitations in adopting trial by a struck jury in cases of this character,—a mode of trial in force in England before the separation of the colonies, for the trial of misdemeanors, and in this state, since the Revolution, for the trial of misdemeanors and high statutory crimes. Fowler v. State, 58 N. J. Law, 423, 34 Atl. 682; Moschell v. State, 53 N. J. Law, 498, 22 Atl. 50. Nor can it be successfully maintained that a jury composed of persons of the qualifications contemplated by the struck jury act, selected as therein provided, with the right to strike off 24 names from the list of persons, and challenges for cause without limit, and the peremptory challenges given by the act, is not an impartial jury for the trial of criminal prosecutions of every grade, within the meaning of the constitutional prescription. The statement in the brief of counsel that this mode of trial is at the option of the prosecutor is incorrect. Either the accused or the prosecutor may apply for such a jury, but neither can obtain it, unless in the judgment of the court, the case is one that is proper to be tried by a struck jury. The same discretion is conferred upon the court in ordering struck juries in civil cases. In New York an act was recently passed providing for special juries by a proceeding analogous to the method of obtaining and selecting struck juries in this state. That act gave to the court, on the application of either the district attorney or of the defendant, authority to grant a trial by a special jury, in its discretion. On an appeal which brought up a conviction for murder, it was insisted by the defendant that this

act created two classes of jurors for the trial of criminal cases, and discriminated unequally, and was therefore in violation of the constitution. The court of appeals, in a recent case, affirmed the constitutionality of the act, and held that it did not violate the constitutional guaranty of due process of law. People v. Dunn (opinion filed Jan. 10, 1899) 52 N. E., 572, 157 N. Y. P. 528. The objection to the mode of trial adopted in this case is without substance, unless words are interpolated in the constitutional provision making peremptory challenges to the number of 20 in this class of prosecutions a constituent part of the constitution; and for that mode of dealing with the constitution there is no sanction. The exception is overruled.

The next class of exceptions relates to the organization of the trial jury. That a venire was issued and returned appears from the colloquy between counsel, the clerk, and the court. It is not printed in the case. It is stated that 11 of the jurors were returned "Not found." It also appears in the same manner that physicians' certificates were presented to the court that two of the jurors were not able to attend; and that there were three absentees who were not excused. On this condition of the panel, the defendant's counsel moved to quash the panel, and that a venire be issued to summon a common jury to try the case. This motion was denied, and exception taken. Section 19 of the jury act provides that, where a rule for a struck jury is entered, it shall remain in force until the cause is tried, and no common jury shall be summoned therein, unless the said rule shall be first vacated by the court, except as provided in the statute. Revision, p. 527, § 13. The exception is that where the defendant has a rule for a struck jury, and shall not procure the jury to be struck, and the panel, duly certified, to be delivered to the plaintiff or his attorney 12 days before the day appointed for trial, the plaintiff may issue his venire for a common jury; and if the defendant shall have a rule for a trial by proviso, and the plaintiff a rule for a struck jury, then

if the plaintiff shall not procure the jury to be struck, and the panel thereof to be delivered to the defendant as aforesaid, the defendant may issue his venire for a common jury. It is not within the power of the sheriff, in summoning the jury, to deprive the parties of the mode of trial prescribed by the statute, nor is it necessary that the whole number of jurors specified in the panel should be present when the case is called for trial. Patterson v. State, 48 N. J. Law, 381, 4 Atl. 449; Smith v. Smith, 152 N. J. Law, 207; Rex v. Hunt, 4 Barn, and Ald. 430; Rex v. Edmonds, Id. 471. No application was made to postpone the trial of the case until two of the jurors had been called, accepted, and sworn. A postponement at that stage of the proceedings was impracticable. During the calling of the jurors to form a jury, two of the jurors summoned were excused by the consent of counsel, and seven of the jurors were permitted to stand aside by consent of counsel. When eleven jurors had been secured, the panel was exhausted, and the court directed the names of those who had been permitted to stand aside to be again put in the box. This was strictly in accordance with the practice. The twelfth juror was obtained from the jurors whose names were put back in the box. The jury who tried the case was obtained from the panel of jurors selected and certified by the court. The exceptions to the several rulings of the court in impanelling the jury are not sustained.

The next exception is to the admission in evidence of a statement made by the prisoner immediately after his arrest. After the killing of the deceased the prisoner was arrested by Officer Myers. He was searched, and on his person were found a revolver, and a black bag containing articles which are described by the police detective as follows:" This is a key opener or key turner. I have seen them on prisoners that have been arrested. It is called a 'key turner.' This other instrument will turn a lock without a key in it. This other one will open the latch in windows.

This other is three screw-drivers in one. This other is a jimmy. It will open bureau drawers or a door. This is a bunch of skeleton keys for opening any door. This other is a bunch of common keys." There were 19 keys, 13 of which were skeleton keys, and 6 ordinary keys. The officer testified that all the articles, except the screw-driver, he had seen many times, and had found them on burglars and sneak thieves. After the prisoner was searched, and had been examined by the doctor, then in the presence of Captains Fanning and Hayes, two captains of the police in Hoboken, in the office of the chief of police, the prisoner made a statement. Hayes testified: "I first introduced Captain Fanning to him. I said, 'This is Captain Fanning, and I am Captain Hayes, at the same time acting chief of police. Have you any objection to making a statement to us in regard to this case?' He said, 'No, I then told him I would take it down in writing, and would use it against him at his future trial, but that it would be voluntarily on his part to give it to me; otherwise, there was no compulsion on him to give it. He said, 'All right.' He then made the statement, and it was reduced to writing by me. I read it to him twice, and he signed his name to it." This testimony was sufficient to make the prisoner's statement competent evidence. Roesel v. State, 62 N. J. Law, 216, 41 Atl. 408. The following is the statement of the prisoner: "James K. Brown; 34 years; born in Jersey City. Number of street, I will not tell. I live in Erie street, J. C., a carpenter by trade; at present out of work, I am married. I have three children. Q. Who did you work for last? A. I won't state. I came here to-day to look for work. The burglar's tools I was going to throw in the river. As to killing the officer, I am very sorry. I had no intent to do so. I only tried to escape on account of having the burglar's tools. The officer came to me on the corner (Twelfth and Bloomfield). He said, 'What are you doing here?' I answered, 'I expect to find a friend.' 'Who is this with you?' 'A friend of mine.' The

reason I answered this way was to get him to walk a block or so, to allay his suspicion. I then attempted to run away from him. He arrested me, knocked me down, and punched me. I tried to get up by placing my hand on his face. He bit my finger. I got up, but he still held to my finger, and my greatest effort could not release it. His hands were then free. He either hit me with the butt of his pistol or stick, which staggered me. I then pulled my hand from his mouth, and dodged to one side, and run. He was directly behind me. Q. Then you were trying to make us believe that you killed him in self-defense? A. I do not. I wanted to escape, only. I could not get away. I looked back, and I saw him with what I supposed was his revolver. I drew my pistol, and said to him, 'Go way from me.' He still followed me. I thought he was going to shoot. I pointed my revolver with the intention of frightening him away. I then fired at him three times. Each shot took an effect."

The prisoner was a witness in his own behalf, and it was brought out on cross-examination that he had been a prisoner in the state prison at Sing Sing for two years,—from July, 1895, to July, 1897. He declined to answer the question whether he had been in any other prison; he declined to answer the inquiry whether he had been convicted of the crime of burglary in the third degree in the general court of sessions of New York on the 20th of June, 1879; and to the inquiry whether he had been convicted of burglary of the third degree in the city of New York, September 17, 1891, his answer was: "Not in the year 1891. I was convicted, but what date I don't know." To the question whether he was convicted of the crime of grand larceny in the second degree in the court of quarter sessions in June, 1895, he answered, "Yes." This cross-examination was proper, at least for the purpose of showing the character of the prisoner as a witness. 2 Gen. St. p. 1399, § 9. It was competent,

also, with respect to the right of the deceased to arrest him.

The remaining exceptions were directed to the charge of the court.

The deceased was appointed a police officer of the city of Hoboken on the 18th of May, 1891. The transaction which resulted in his death occurred in the afternoon of the 29th of July last, about half past four. The deceased was on duty at that time in citizen's dress, detailed on detective work. The prisoner, in his testimony, said that he did not know that the deceased was an officer. The deceased and James Buchanan and Alonzo W. Letts were standing on the north side of Twelfth street, between Bloomfield and Garden, about 50 feet west of Bloomfield street. These witnesses testified that they saw the prisoner on the north side on the corner, standing on Bloomfield street about 5 feet from the cross walk, looking up and down the street. Letts said the deceased was talking to him, and the prisoner turned and went up Bloomfield street, and entered the flat house on the northeast corner, entered the vestibule, and pulled the door behind him; that the deceased went in there and pulled the man from behind the door, and spoke to him; that it seemed to him that the deceased was showing his badge; he rested his hand on the lapel of his coat. Then they came out of the house, and together turned up towards Washington street—the prisoner pointing to Washington street. That there was in the conduct of the prisoner that which had excited the suspicion of the officer is apparent from the testimony of the prisoner himself. He testifies that he saw the two men talking and he thought it very peculiar that they should watch him, and that he thought he had better go in the first doorway he saw, and see whether they would follow him any further. It is also apparent from the prisoner's statement at the police office that the deceased in fact had arrested him, and that the shooting by the prisoner was for the purpose of effecting an escape. At common law

a peace officer has a right to arrest, without warrant, one whom he suspects to be guilty of felony, although it afterwards appears that no felony was committed, provided that he has reasonable cause to suspect that the person arrested has committed a felony. There is this distinction between a private individual and a constable: In order to justify the former in causing the imprisonment of a person, he must not only make out a reasonable ground of suspicion, but he must prove that a felony was actually committed; whereas a constable, having reasonable ground to suspect that a felony has been committed, is authorized to detain the party suspected until inquiry can be made by the proper authorities. Reuck v. McGregor, 32 N. J. Law, 70–74; Beckwith v. Philby, 6 Barn. & C. 635; Clark, Cr. Proc. § 12; 1 Benn. & H. Lead. Cr. Cas. 197–202. The distinction between felonies and misdemeanors is not observed in our Criminal Code. Statutory offenses, if designated at all, are called "misdemeanors" or "high misdemeanors." Jackson v. State, 49 N. J. Law, 255, 9 Atl. 740. The grade of the offense in our Criminal Code is determined by the character and degree of the punishment prescribed, rather than upon the common-law classification of felonies and misdemeanors. By statute it is made a high misdemeanor, punishable by imprisonment in the state prison for a term not exceeding seven years, if any person shall by day or by night willfully or maliciously break or enter into any dwelling, or enter by day or night, without breaking, any dwelling house, etc.; with intent to steal. P. L. 1898, p. 830, §§ 131–133. By another section an attempt to commit any of the offenses mentioned in the act, or any offense of an indictable nature at common law, though such offense was not actually committed, is made a misdemeanor punishable by imprisonment in the state prison at hard labor for a term not exceeding three years, etc. Id. p. 854, § 216. By another section it is made a high misdemeanor, punishable by imprisonment in the state prison for a term not ex-

ceeding seven years, for a person to have in his possession any tool or implement adapted or designed for cutting through, forcing, or breaking open any building, etc., knowing the same to be adapted or designed as aforesaid, with intent to use or employ, or allow the same to be used or employed, for that purpose. Id. p. 830, § 134. A person engaged in the commission of the crimes referred to in the sections of the crimes act above mentioned would, under the rules of the common law, be liable to arrest by an officer without process; and a person having in his possession the implements found in the possession of the accused with the intent to break into any building, etc., would be liable to arrest by an officer without process. The prisoner testified that he had no intent to break into the house; that he entered the vestibule to escape, because he had in his possession the burglars' tools that he had brought over to Hoboken, not for any criminal purpose, but to get rid of them. But the accused, in the police court, was found in the possession of the tools of a burglar or sneak thief. His conduct in going into the flat was suspicious, and the officer, if he had no knowledge of the antecedents of the accused, had no knowledge of his purpose in going there, and if, acting on his own view of the conduct of the prisoner, he had reasonable grounds to suspect the prisoner's object in going into the vestibule and pulling the door behind him was to commit a criminal offense, he had a right, and it was his duty, to arrest him without process; and the trial court submitted that question, as a question of fact, to the jury.

By section 2 of the act concerning disorderly persons, "any person having upon him any picklock, key, crow, jack, bitt, or other implement, with intent to break into any building * * * or who shall be found in or near any dwelling-house," etc., with intent to steal any goods and chattels, shall be deemed and adjudged to be a disorderly person;" and by section 36 it is made the duty of every constableor other police officer, and lawful for any person, to apprehend,

without warrant or process, any disorderly person, and take him before any magistrate of the county where he shall be apprehended. P. L. 1898, pp. 942-953. The learned judge in his charge excluded from the consideration of the jury these provisions of the disorderly act, and presented the right of a peace officer to arrest without process under the provisions of the crimes act, exclusively. The right of a peace officer to arrest without process under the disorderly act is of prime importance in the maintenance of public peace, especially in the large cities. In Mayor, etc., v. Murphy, 40 N. J. Law, 145-150, Mr. Justice Reed, speaking of the authority to arrest summarily, says: "In this state, by the act concerning disorderly persons, it has been extended to a class of cases which would seem to include almost every instance where the police regulation of any municipality would require speedy treatment." The right of arrest under that statute is referred to, that it may not be inferred that in the judgment of this court it is to be excluded in the consideration of cases of this kind. In Mackalley's Case, 9 Coke. 68, which was an indictment for murder in killing a police officer in making an arrest, "it was resolved that if any magistrate or minister of justice in execution of his office, or in keeping of the peace according to the duty of his office, be killed, it is murder;" and the reason given is that: "It is true that the life of a man is much favored in law, but the life of the law itself (which protects all in peace and safety) ought to be more favored; and the execution of the process of law, and of the officers and conservators of the peace, is the life of the law, and the means by which justice is administered and the peace of the realm kept." The offense of killing an officer in the performance of his duty is provided for by the statute, which enacts that "if any person or persons shall kill any judge, magistrate, sheriff, coroner, constable or other officer of justice, either civil or criminal, of this state * * * in the execution of his office or duty, or shall kill any assistant, whether

specially called in aid or not, endeavoring to preserve the peace or to apprehend a criminal, knowing the authority of such assistant, or shall kill a private person endeavoring to suppress an affray or to apprehend a criminal, knowing the intention with which such private person interposes, then such person so killing as aforesaid shall be guilty of murder." P. L. 1898, p. 824. § 106. It is only where the homicide is of an assistant when aiding an officer in the endeavor to preserve the peace or to apprehend a criminal, or a private person interposing to suppress an affray or to apprehend a criminal, that knowledge of the authority of such assistant, or of the intention with which the private person interferes, is necessary to bring the case within the provision of this statute. The deceased was lawfully in the execution of his office, and within the protection of the statute. Unless the act of killing is justified or mitigated to a less grade of crime, the accused, by force of this statute, was guilty of murder.

The instruction of the learned judge was that the police officer, having the same powers as a constable or sheriff, in this respect, under the common law, is justified in making arrest without warrant, provided he acts in good faith upon such facts and circumstances as amount to a reasonable and proper ground for suspicion. "If he has reasonable cause to suspect that a felony has been actually committed, he is justified in arresting the parties suspected, although it afterwards appear that no felony has been committed, and whether his judgment was a proper judgment or not must be left to the jury. * * * He could also arrest an offender, without warrant, for treason, felony breach of the peace, and some misdemeanors, when committed in his view, or if there existed facts which gave rise to the reasonable judgment to suspect the person arrested to be the guilty party. If these were the circumstances there, the defendant could not complain of his arrest, and could not resist it." The judge, on this subject, further instructed the jury:

"Was the accused subject to arrest for any of these supposed crimes? If so, no person could know it any better than he. If the facts were such as to give rise to a reasonable suspicion, no one knew it better than he; and, if he was thus subject to arrest, if in resisting arrest or in his endeavor to escape arrest he killed the officer without the necessity of self-defense, it would be murder of one degree or the other, depending upon whether he deliberately intended to take the life of the officer, or only to do grave bodily harm. I have said that, in order to render the arrest lawful by the officer, it was not necessary that he should be guilty of either of the offenses charged against him. The arrest would be lawful, even though he might be innocent. The prisoner could not adjudge for himself whether the facts and circumstances were such as would justify his arrest. The main question for you to determine here is whether he had created facts and circumstances which would give rise to the right to make the arrest; that is, give rise, in the judgment of the officer, of a reasonable cause to suspect him of being guilty." The instruction of the learned judge on this head, in giving effect to the statute referred to, was correct.

The judge instructed the jury that if the act of killing was not excusable or justifiable on the ground of self-defense, and was not reduced to manslaughter, then it would be murder of the first or second degree; the act of killing being established, the presumption was that it was murder of the second degree." * * * If the defendant seeks to reduce it to a lower degree of homicide, he must establish that by the evidence in your minds to your satisfaction; and, if the state demands a verdict of murder of the first degree, the burden is upon the state to establish it beyond reasonable doubt." Murder is by section 107 of the crimes act (P. L. 1898, p. 824) classified into two degrees,—murder of the first degree and murder of the second degree. That section enacts that all murder which shall be perpetrated by means

of poison or lying in wait, or by any other kind of willful, deliberate, and premeditated killing, or which shall be committed in perpetrating or attempting to perpetrate certain specified crimes, shall be murder of the first degree, and that all other kinds of murder shall be murder of the second degree. The legislature, in declaring what shall constitute murder of the first degree and what murder of the second degree, created no new crimes, but merely made a distinction with a view to the difference in the punishment. Graves v. State, 45 N. J. Law, 347–358. The act of killing being such as at common law or under the statute would amount to murder, the judge properly charged the jury that the presumption was of murder of the second degree and that, if the state purposed to raise the degree of criminal responsibility to that of murder of the first degree, it must accept the burden of proving beyond a reasonable doubt that the killing was such as by the section just referred to would constitute murder of the first degree. In defining the essential qualities of murder of the first degree, the learned judge quoted and adopted the language of the court in Donnelly v. State, 26 N. J. Law, 465-510.

The contention at the trial was that the killing of the officer was justified on the ground of self-defense. The evidence showed: That the prisoner and the deceased came down the steps together, and proceeded into Twelfth street, on the south side, where a struggle ensued between them. That after they had broken away from each other, or the prisoner had broken away from the officer, the prisoner, in backing off or getting away, with the deceased following him, fired three pistol shots at the deceased, one after the other; two of the three shots taking effect in the body of the deceased. The witnesses describe the two men as wrestling, scuffling, fighting. That the prisoner had a pistol, and that the deceased was endeavoring to get it from him. That the prisoner was backing away from the officer, and ran two or three feet, and stopped and turned around. The deceased was after him, as

if he wanted to catch him. That, as the deceased was approaching the prisoner, the prisoner pulled out the pistol, and fired once. Then the prisoner turned and ran away again, the deceased still pursuing him, and then the prisoner again shot. The officer was also armed with a pistol, which he had in his hand. That he attempted to fire his pistol, but for some reason or other his pistol was not discharged. The statement of the prisoner at the police court is important on this subject. He says: That when the officer came to him, and said to him, "What are you doing?" he answered, "I expect to find a friend." The officer asked, "Who is this with you?" That the prisoner answered, "A friend of mine." "The reason I answered him this way was to get him to walk a block or so, to allay his suspicion. I then attempted to run away from him. He arrested me." "Q. Then you are trying to make us believe that you killed him in self-defense? A. I do not. I wanted to escape, only, I could not get away. I looked back, and saw him with what I supposed was his revolver. I drew my pistol, and said to him, 'Go away from me.' He still followed me. I thought he was going to shoot. I pointed my revolver with the intention of frightening him away. I then fired at him three times. Each shot took an effect." The instructions of the trial court on this subject were: "Taking life in the course of the necessary defense of one's person is a legal defense upon an indictment of this kind. But the law, from the highest considerations of public policy, circumscribes the right of one person to take the life of another within narrow limits, and allows it to be exercised only under extraordinary circumstances. The burden of proof of self-defense is upon the prisoner. He must show to the satisfaction of the jury a situation and circumstances under which that right may be lawfully exercised; and, before his defense is complete, those facts and circumstances must appear to bring the act done by the prisoner within the prescribed limits. The weapon that was

used here was one capable of producing either death or grave bodily harm. The shots were delivered upon a vital part of the officer's body, and resulted in immediate death. The question for the decision of the jury is, upon this matter, whether this act of the prisoner was an act in the lawful defense of his person. To make his defense available, the justification must be co-extensive with the act intended to be done; and the character of the weapon used, the place where the shot was delivered, the circumstances under which it was delivered, are all to be borne in mind in passing judgment upon the defense of self-defense set up in this case. Did he kill here in defense of himself, to prevent his own life being taken, or to prevent great bodily harm arising to him by reason of the conduct of the officer in making the arrest, or did he do grave bodily injury with the intent of escaping arrest? To kill to escape arrest is not self-defense. The foundation of the right to take life by the way of self-defense is necessity. There must exist a necessity for resorting to violence for self-protection, and necessity for using the means that were used to secure the defense of the person. An accused is justified in using force to defend his person only when force is necessary to accomplish that end. If the injury apprehended could be otherwise avoided the prisoner was bound to avoid the danger without resorting to violence; and, even if the circumstances be such as to require the use of force to repel the assault, he will be inexcusable if he carried his defense beyond the bounds of necessity. The danger must be immediate, and must be actual, or else apprehended on reasonable grounds, of which the jury is to judge. The accused could not make his judgment of the necessity of slaying the deceased in order to defend himself a justification of his act. Whether the necessity for taking life existed must be determined from the situation of the accused at the time, and it is the province and duty of the jury to determine that question. Now, the facts of the shooting are taken by you. Was the

officer here, by any action of his own, making this arrest, putting the life of the prisoner in danger, or doing that which would cause him great bodily injury, or was any of his acts in making the arrest such as to warrant an apprehension in the prisoner's mind that his life was in danger, or that grave bodily harm would come to him unless he used the pistol upon the officer, and which demanded of him the act of slaying the officer in order to protect his body from such danger? If the arrest was a lawful one, the officer had a right to use the force necessary to render the arrest effective; and if the prisoner, by his resistance to the arrest, brought violence upon himself, which put his body in danger, that cannot be made justification for killing the officer. His duty, the arrest being lawful, was to submit to arrest, if made with the use of no unnecessary force; and, if his resistance caused force to be applied, he cannot complain that sufficient force was used to render the arrest effective." The errors assigned on the part of the charge are (1) with respect to the instruction that the burden of proof of self-defense is on the prisoner—that he must show to the satisfaction of the jury a situation and circumstances under which the right of self-defense could be lawfully exercised, and, before his defense is complete, those facts and circumstances must appear to bring the act done by the prisoner within the prescribed limits; and (2) the instruction that "to kill to escape arrest is not self-defense;" and (3) that the accused could not make his judgment of the necessity of slaying the deceased in order to defend himself a justification of his act; that it was the province of the jury to determine that question.

"In every charge of murder, the fact of killing being first proven, all the circumstances of action, necessity, or infirmity are to be satisfactorily proven by the prisoner, unless they arise out of the evidence produced against him; for the law presumeth the fact to have been founded in malice, until the con-

trary appear. The matters tending to justify, excuse, or alleviate must appear in evidence, before he can avail himself of them." Fost. Crown Law, 255. Mr. Justice Blackstone, speaking of acts justifying a homicide, or excusing it, or mitigating it to manslaughter, says: "All these circumstances of justification, excuse, or alleviation it is incumbent upon the prisoner to make out to the satisfaction of the court and jury, the latter of whom is to decide whether the circumstances alleged are proved to have actually existed: the former, how far they extend to take away or mitigate guilt; for all homicide is presumed to be malicious, until the contrary appeareth in evidence." 4 Bl. Comm. 201. "On every charge of murder, the fact of killing being first proved, the law presumes it to have been founded in malice, until the contrary appear, and therefore all circumstances alleged by way of justification, excuse, or alleviation must be proved by the prisoner, unless they arise out of the evidence against him." 1 East. P. C. 340. "Besides the presumptions which a jury may make from circumstantial evidence, there are also presumptions of law. Thus, on every charge of murder, the fact of killing being first proved, the law presumes it to have been founded on malice, till the contrary appear. Therefore all circumstances alleged by way of justification, excuse, or alleviation must be proved by the prisoner, unless they arise out of the evidence produced against him." 3 Russ. Crimes (6th Ed.) 360. This doctrine was declared to be the law in this state as early as State v. Zellers, 7 N. J. Law, 243. The distinction is between the burden of proof in the order of the trial of the issue arising in the case, and the effect of evidence offered either by the state or by the accused, to which the doctrine of reasonable doubt is applied. It would be a novelty in the trial of criminal cases to require the state to disprove affimatively, beyond a reasonable doubt, every defense that possibly might be made. Mr. Wharton says: "We frequently hear that, after a prima facia case on one

side, the burden of proof is shifted to the other side; and this shifting of the burden of proof, which no doubt takes place after a prima facia case, is sometimes confounded with the question of the degree of proof necessary to a verdict. The questions are entirely separate. A defendant may often have the burden of proof imposed on him. But, when the case goes to the jury, there is no essential element in his guilt which must not appear to be proved beyond reasonable doubt." Whart. Hom. § 647. The trial court so dealt with this subject, and, while holding that the burden of proof of the situation and circumstances under which the right of self-defense might lawfully be exercised was on the prisoner, instructed the jury that: "The benefit of the reasonable doubt always goes to the defendant, and always is applied n his favor. He is never presumed to be any more guilty than the facts make him, and your conclusion of guilt must be beyond reasonable doubt, in order to convict." The full instructions of the trial judge on the subject of reasonable doubt, as applicable to the entire case, will be stated hereafter.

There is a broad distinction between the obligation to make proof of facts and circumstances upon which a particular defense rests, and the effect of such evidence upon the ultimate issue of the trial. In a civil suit for an assault and battery, a justification of son assault, etc., must be pleaded, and at the trial the burden is on the defendant to prove a justification by way of self-defense commensurate with his assault upon the plaintiff. The feature that distinguishes a criminal prosecution from a civil suit arising out of the same transaction is that in the latter the burden of proving a justification is throughout upon the defendant, but in the criminal prosecution, after the facts are proved which give occasion for self-defense, the accused is entitled to the benefit of a reasonable doubt with respect to his guilt upon the whole case. In such a prosecution, if no facts are shown which would in law give occasion for self-defense a justifica-

tion on that ground will disappear from the case; but, if such facts are shown to the satisfaction of the jury, then the jury make their deductions and inferences therefrom, and the issue of the guilt or innocence of the accused is to be determined upon the whole case, according to the accused the benefit of a reasonable doubt which inheres in a criminal prosecution. In some of the cases the doctrine that the burden of proof is ever on the accused, where self-defense is interposed as a justification, is said to be inconsistent with the presumption of innocence. This is an assumption that is in fact unfounded. The presumption of innocence that first arises is that the deceased has done nothing that justified the accused in taking his life, and that presumption continues until overcome by evidence. It would be illogical, as well as unjust, to affix upon the conduct of the deceased the imputation of criminality, which, in the absence of evidence to the contrary, would make the killing justifiable. When a homicide is committed it would shock a sense of justice to assert, without knowledge of the circumstances, that the man who is killed deserved death; and yet the presumption asserted in favor of a prisoner, that he has no burden of proof in connection with a justification of that character, amounts in substance to the same thing. The accused can have no cause of complaint, if on the trial of the indictment he is required to lay before the court the facts which prompted or induced his acts, if he be accorded the benefit of a reasonable doubt with respect to his guilt or innocence upon the whole case.

The case cited as the leading case against this view is Stokes v. People, 53 N. Y. 164. I do not understand the decision of that case to controvert the rule of the common law with respect to the presumption arising from the act of killing. The justification in that case was by way of self-defense, and the charge of the trial court, which was held to be erroneous, was that: "The fact of killing being conceded, and the law implying malice from the cir-

cumstances of the case, the prosecutor's case is fully and entirely made out; and therefore you can have no reasonable doubt as to that, unless the prisoner shall give evidence sufficient to satisfy you that it was justified under the circumstances of the case." The trial judge in his instructions also charged that: "Ordinarily, naturally, and properly, in cases of this kind, juries are disposed to and should, give the prisoner the benefit of any reasonable doubt that may exist in the case; and I do not know that even this is an exception to that rule. If the evidence shall be doubtful upon that subject, if you should entertain reasonable doubts, if the evidence is evenly balanced, so that you do not know where the truth lies, the prisoner would be entitled to the benefit of that doubt." The learned judge who delivered the opinion of the court of appeals of New York, in commenting upon this instruction, said (page 178) that: "The benefit of the doubt to be given to the prisoner should not have been restricted to their finding of the evidence evenly balanced, so that they did not know where the truth lay. On the contrary; the instruction would have been not to convict of that crime, unless convinced by all the evidence in the case that he was guilty, and that, if a careful examination of all the evidence left in their minds reasonable doubt of his guilt, they should give the prisoner the benefit of an acquittal. This instruction was warranted by the common law of England." The learned judge adds: "But the question in this case is not what was the rule of the common law as to the implication of malice from the act, whether such rule is deduced from authority or principle and legal analogy. The question arises upon the statute of the state by which homicide is made justifiable or excusable, murder in the first or second degree, or manslaughter in one of four degrees, determinable by the intention and circumstances of its perpetration. Under the statute it is obvious that mere proof that one has been deprived of life by the act of another utterly fails to show the class of the homicide under the stat-

ute." The court did not overrule, or even cite, the earlier case (People v. Schryver, 42 N. Y. 1), in which it was held, on an indictment for manslaughter, where it was claimed that the killing was done in self defense, that on such a claim of justification the accused must take upon himself the burden of satisfying the jury by a preponderance of evidence, and must produce the same degree of proof that would be required if the blow inflicted had not ensued in death, and he had been indicted for assault and battery, and had set up a justification. It may be inferred from the fact that, in the Stokes Case, People v. Schryver was not overruled, as well as from the language of the judge in pronouncing the judgment, that that decision was placed upon the statute, and not upon the common law. Other authorities in elucidation of the principle that the burden is on the accused of proving the facts and circumsrances upon which justification or mitigation rests will be cited in considering another branch of this case.

At the close of the evidence on the part of the state in this case, and upon the proof adduced at that stage, there was no ground on which justification by way of self-defense could be rested. The defense, if permissible at all, arose from the testimony of the defendant himself. The charge of the judge, that the burden was on the accused to prove the facts and circumstances necessary for such a defense, was in accordance with the doctrines of the common law, which at an early period of our judicial history were adopted, and have been recognized as the law without dissent, it is believed, down to the present time. The instructions with respect to the circumstances under which an accused is justified in resorting to self-defense with the weapon that was used were correct. "The right of self-defense has always been regarded as founded on necessity, and is in no case permitted to extend beyond the actual continuance of that necessity by which alone it is warranted." 1 East. P. C. 271-278. "Before a person can avail himself of the defense that he

used a weapon in defense of his life, he must satisfy the jury that that defense was necessary to protect his own life, or to protect himself from such serious bodily harm as would give him a reasonable apprehension that his life was in immediate danger." 3 Russ. Crimes (6th Ed.) 208. And again: "It should further be observed, as the excuse of self-defense is founded on necessity, it can in no case extend beyond the actual continuance of that necessity, by which alone it is warranted." Id. 211, 212; 1 East, P. C. 293; Fost. Crown Law, 273-279. In State v. Wells, 1 N. J. Law, 424, which was an indictment for murder on a defense that the killing was done by way of self-defense, and a conviction of murder, the supreme court held that "no man is justified or excusable in taking the life of another, unless the necessity for so doing is apparent, as the only means of avoiding his own destruction or some great injury, neither of which appears to have been reasonably apprehended in the present case." Justification for taking life by the use of a deadly weapon results from the situation of the accused at the time the fatal wound was given. Whether his situation was such as to warrant resort to such means to protect himself from a danger, actual or apprehended on reasonable grounds, and whether before the fatal wound was given the accused had done everything exacted by the law to avoid taking life, involve the determination of questions of fact. The accused cannot make his own judgment of the necessity of slaying the deceased his justification. The judge properly instructed the jury that whether the necessity for taking life existed must be determined from the situation of the accused at the time, and that it was the province of the jury to determine that question. Whether the arrest of the prisoner by the deceased was lawful was correctly submitted to the jury; If, in the fiindng of the jury, the arrest was lawful, it would be superfluous to discuss the question whether it would be justifiable

in the accused to kill the officer in order to effect an escape.

The instructions of the trial judge with respect to manslaughter are also under exception, on which errors have been assigned. The trial judge instructed the jury that, the killing being established, the presumption was that it was murder of the second degree and that, "if the defendant desired to reduce it to a lower degree of homicide, he must establish that by the evidence, in your minds, to your satisfaction." Citation has already been made of some of the common law authorities with respect to the presumption from the act of killing, and the burden of the proof on the question of justification and mitigation. A reference to a few of the leading cases and authorites more particularly applicable to a mitigation of the offense to manslaughter will be made. Mackalley's Case, 9 Coke, 67, which has already been cited, was an indictment for murder in killing a police officer who had arrested and had another in custody. The case was heard en banque, on a special verdict, before all the judges of England. "It was resolved, if one kills another without provocation, and without malice prepense which can be proved, the law adjudges it murder and implies malice: * * * and therefore, when he kills one without provocation, the law implies malice; and in both these cases they may be indicted generally, that they killed of malice prepense, for malice implied by law given in evidence is sufficient to maintain the general indictment." In Legg's Case, J. Kel. 27, the accused was indicted for the murder of R. W. It was held by the court that "it was upon evidence agreed that if one kill another, and no sudden quarrel appeareth, this is murder, as in Mackalley's Case, and it lieth on the party indicted to prove the sudden quarrel." These principles were adopted in Oneby's Case, 2 Ld. Raym, 1494, 2 Strange, 766. Raymond, C. J., in giving answers to the objections which were made on behalf of the prisoner, and which had been duly weighed and considered by the court,

said: "One objection to the verdict was that the homicide was upon a sudden quarrel, and so but manslaughter, whereupon the court stated the rule thus: In answer to this objection, I must first take notice that, when a man is killed, the law will not presume that it is upon a sudden quarrel, unless it is proved to be; and therefore in Legg's Case it was agreed, upon evidence, that if A. kills B., and no sudden quarrel appears, it is murder, for it lies upon the party indicted to prove the sudden quarrel." In 1 Hawk. P. C. c. 31, § 32, it is laid down that, "wherever it appears that a man killeth another, it shall be intended prima facie that he did it maliciously, unless he can make out to the contrary, by showing that he did it on sudden provocation," etc. The general doctrine of the law, as stated in the latest edition of Russel, is that: "whenever death ensues from the sudden transport of passion or heat of blood upon a reasonable provocation, and without malice, it is considered as solely imputable to human infirmity, and the offense will be manslaughter. It should be remembered that the person sheltering himself under this plea of provocation must make out the circumstances of alleviation to the satisfaction of the court and jury, unless they arise out of the evidence produced against him, as the presumption of law deems all homicide to be malicious until the contrary is proved." 3 Russ. Crimes (6th Ed.) p. 172. Citations to the same effect from Foster, Blackstone, and East have already been made; and it is believed that this principle is sustained by the English text books and decisions, without any qualification or dissent. It was adopted in this state in the Zellers Case, 7 N. J. Law, 243.

In Com. v. York, 9 Metc (Mass.) 93 (in a case which has been considered as the leading case in this country), it was held that: "On a trial for murder, if the killing be proved to have been done by a wound willfully inflicted with a deadly weapon, upon a vital part, with great violence, and nothing further is shown, the presumption of law is that it was malicious, and

an act of murder. The proof of excuse or extenuation lies on the defendant, which may appear either from evidence adduced by the prosecution, or from evidence offered by the defendant." In that case it was held that it was not only incumbent on the defendant to make proof of the matter of excuse or extenuation, but that the proof must be by a preponderance of evidence, sufficient to satisfy the jury of the fact, and that the accused was not entitled to a verdict, though there should be a reasonable doubt of the fact of extenuation. Com. v. York was followed in Com. v. Webster, 5 Cush. 295. In both of these cases the opinion was delivered by Chief Justice Shaw. In a later case (Com. v. Hawkins, 3 Gray, 463), which was an indictment for murder, tried before the same chief justice and Justices Metcalf and Bigelow, the contention was that the offense was mitigated to manslaughter. The evidence was that the parties were under the influence of liquor, and, after insulting words, had fought with fists, and that while they were fighting the deceased was stabbed with a knife. All the evidence in the case was produced on the part of the commonwealth. No evidence was offered on the part of the accused. The chief justice, at the close of the trial, remarked that the doctrine of York's Case was that where the killing is proved to have been committed by the defendant, and nothing further is shown, the presumption of law is that it was malicious, and an act of murder, and that this was inapplicable to the present case, where the circumstances attending the homicide were fully shown by the evidence. On this point the chief justice instructed the jury as follows: "The murder charged must be proved. The burden of proof is on the commonwealth to prove the case. All the evidence on both sides which the jury finds to be true is to be taken into consideration, and if, the homicide being conceded, no excuse or justification is shown, it is either murder or manslaughter; and if the jury, under all the circumstances, are satisfied beyond a reas-

onable doubt that it was done with malice, they will return a verdict of murder; otherwise, they will find the defendant guilty of manslaughter." It may be observed that there is, in substance and effect, little difference between the instructions of the Massachusetts court in the Hawkins Case and the charge of the judge in this case, taking the whole charge together, —the instructions as to the burden of proof, and his directions with respect to the effect of reasonable doubt in the trial of a case. With respect to the conditions under which a homicide may be mitigated to manslaughter, on the contention that the act of killing was done in the heat of blood, or in a sudden transport of passion, the learned judge instructed the jury as follows: "The object of the law is to have passion controlled and subdued, and not permit it to become the excuse or palliation of crime. To mitigate the offense to manslaughter, the facts must show that the act was done in the excitement of passion; it must appear that the killing resulted from passion or heat of blood produced by a reasonable provocation. It is not every provocation that will reduce a killing from murder to manslaughter. The provocation must be of such a character, and so close upon the act of killing, that for the moment the prisoner could be considered as not master of his own understanding. If such an interval of time elapsed between the provocation and the act of killing as is reasonably sufficient for reason to resume its sway, the offense is not mitigated to manslaughter. I have said the provocation must be reasonable, and must be recent, and the act of killing must be done in a sudden transport of passion. Whether the provocation was reasonable, and whether sufficient time elapsed between the provocation given and the act of killing for the accused to subdue or control his passion, are questions of fact, to be determined by the jury on a consideration of the circumstances of the particular case before them." These instructions in all respects conform to legal rules and principles which apply to and control the

issue involved in this branch of the case. 2 Rosc. Cr. Ev. 772-781.

As the case stood when the state rested, the proof was of an arrest by a police officer on reasonable grounds, and the shooting by the accused in the effort to escape. On his examination as a witness, the prisoner testified that his object on going into the vestibule was an innocent object, and that he did not know that the deceased was an officer. The charge of the trial judge on this subject was as follows: "The prisoner contends here that the arrest was unlawful, and, if unlawful, it was the reasonable provocation of hot blood or sudden passion in the prisoner resisting the arrest; he having no notice of the official character of the deceased, and, having no notice of it, he killed the deceased, and therefore his act of killing would be only manslaughter. If the arrest was unlawful, in the sense I have defined (that is, that no crime had been committed by him, or that the officer had no reasonable cause to suspect him of being guilty of a crime), then it was unlawful; and if it was unlawful in this sense (that is, an arrest where no crime had been committed, or that the officer had no reasonable cause for it), and the defendant had no notice or knowledge of the official character of the person making the arrest, and, thereupon, the arrest being made, hot blood or sudden passion was evolved or created in the mind of the defendant, and in that hot blood or sudden passion the shooting was done, the offense would be manslaughter only, and not murder of either degree. But the same questions of fact still remain: Was the arrest unlawful, or did the prisoner have notice of the official character of the person making the arrest? If the prisoner knew the person arresting him—knew him to be an officer,—and he had committed a crime, which the officer had reasonable grounds to suspect him to be guilty of, the law does not permit the arrest to be a provocation sufficient to reduce the killing to manslaughter." These instructions are quite as favorable to the prisoner as

be had any right to require. Nor has the prisoner any cause of complaint that he was not accorded by the trial judge the benefit of a reasonable doubt to the full extent. Near the commencement of the charge the learned judge used this language: "In this case, once for all, you can remember it, and apply the principle as you go along in the investigation of the case, that the prisoner at the bar, when put upon his trial under this indictment, is presumed to be innocent, and his guilt, whatever phase it may take in your minds, whatever your conclusions from the facts may be, must be established in your mind and in your judgment beyond reasonable doubt, before you can convict. If, in this case, there should arise any reasonable doubt as to the guilt or innocence of the defendant generally upon this indictment, and under this evidence, your duty would be to acquit him of any offense. If, in considering this case, and applying the principles of law which will be given to you by the court, you should be clear, and find beyond reasonable doubt, that guilt has been established, but you should be in that state of mind which is called 'reasonable doubt' as to whether his guilt was that of manslaughter, or of murder of either of the degrees, the benefit of that reasonable doubt would go to the prisoner, and you would find him guilty of the lesser degree of homicide; that is, manslaughter. If it should be established to your minds beyond reasonable doubt that the defendant was guilty of the offense of murder, and you should be in that state of reasonable doubt as to whether it is murder of the first degree or of the second degree, you would, under the law, be bound to convict of murder of the second degree only; and you would convict of murder of the first degree only when, under the law and under the facts, that degree is established beyond reasonable doubt." And in defining "reasonable doubt" the judge used the expression that: "It is the doubt which makes you hesitate as to the correctness of the conclusion which you reach. If, under your oaths

and upon your consciences, after you have fully investigated the evidence, and compared it in all its parts, you say to yourself: 'I doubt if he is guilty,' then that is reasonable doubt. It is a doubt which settles in your judgment and finds a resting place there." The learned judge then closed his directions as to reasonable doubt in this emphatic language: "The benefit of the reasonable doubt always goes to the defendant, and always is applied in his favor. He is never presumed to be any more guilty than the facts make him, and your conclusion of guilt must be beyond reasonable doubt, in order to convict." The court, having instructed the jury upon the effect of reasonable doubt in language comprehending every issue in the case, was not obliged to reiterate it, and apply it specifically to every such issue. Warner v. State, 56 N. J. Law, 686-688, 29 Atl. 505. The charge of the court must be considered with reference to the case as it was made. The fair import of the judge's instructions, taken as a whole, is that the obligation rests primarily on the accused of proving such facts and circumstances as in law may justify the homicide, or mitgiate the offense to manslaughter; submitting to the jury the issue of the guilt or innocence of the accused upon all the evidence in the case, and according to the accused the benefit of a reasonable doubt, which the learned judge declared "always goes to the defendant, and always is applied in his favor." The charge in these respects is sustained by the entire body of common-law precedents, and, I may add, by all the reported decisions in this state.

The other exceptions and assignments of error have been examined. Finding no error upon the record, the judgment should be affirmed.

Endorsed: "Filed March 6, 1899, George Wurts, Clerk".

MAGIE, C. J., and DIXON and HENDRICKSON, JJ., dissent.

DIXON, J.: The plaintiff in error, having been convicted of murder in the first degree, contends that his constitutional rights were infringed by trying him before a struck jury; that is, a jury drawn from among the persons named on a panel selected by a judge, from which panel the state and the prisoner had struck an equal number of names. The constitutional prescriptions are these: "The right of trial by jury shall remain inviolate;" and, "in all criminal prosecutions, the accused shall have the right to a speedy and public trial by an impartial jury." I have been unable to find any reason for thinking that the procedure mentioned runs counter to these constitutional injunctions. But, according to our statute, in cases tried before struck juries, accused persons are entitled to only 5 peremptory challenges, while at the time of the adoption of our constitution persons accused of certain high crimes (among them, murder) were entitled to 20 peremptory challenges. This feature of the statute I deem unconstitutional. The right of the accused to challenge peremptorily, on being confronted with the proposed juror, immediately before the trial, I regard as a very important means of securing to him what the constitution guarantees,—an impartial jury. The accused may know of a bias, the grounds of which he cannot prove or dare not disclose, or he may create a bias by an unsuccessful attempt to support a challenge for cause; and in any of these circumstances his sole resort is to a peremptory challenge. The evident utility and importance of this right, in order to insure the attainment of the constitutional aim,—trial by an impartial jury,—justify the conclusion that, so far as the right existed when the constitution was framed, it is within the guaranty of that instrument. And, if the right of peremptory challenge be thus guaranteed at all, the most reasonable and the safest inference is that it is guaranteed to the same extent as it then had. I am therefore of opinion that a person on trial for any of these high crimes is entitled to 20

peremptory challenges, to be presented when the accused and the proposed juror are brought face to face, immediately before the trial. The present record, however, does not show that this right was denied to the plaintiff in error; for his specific objection was only to a struck jury, and every peremptory challenge interposed by him was allowed. On this ground a reversal of the judgment could scarcely be demanded. But I think there were, in the charge of the judge to the jury, errors which require reversal.

The undisputed facts established by the evidence were that the prisoner shot and killed Charles Gebhardt, in the city of Hoboken; that Gebhardt was a policeman of the city, and at the time of the homicide was arresting the prisoner without a warrant. The matter in dispute, on the evidence, were whether the prisoner had notice that Gebhardt, then in the dress of a private citizen, was a policeman; whether there existed any legal cause for the prisoner's arrest; and whether, when the prisoner fired the fatal shots, Gebhardt had a pistol aimed at the prisoner, as if about to shoot him. Under these circumstances, the judge instructed the jury as follows: "If you find that the act of killing Gebhardt was the act of the prisoner at the bar (and of that there is no dispute here; that fact is conceded by the evidence and by the counsel in the trial of the case), the presumption arises, notwithstanding the person slain was an officer of the law, and notwithstanding this killing grew out of an attempt to make an arrest, the killing having been established as that of the defendant, that the degree of the offense is murder of the second degree only. That presumption of law existing, the burden is then on the prisoner to mitigate that degree of guilt from murder of the second degree to manslaughter. That burden rests upon him to take the offense away from the effect of the presumpt on just stated, and by evidence reduce the killing to manslaughter. The killing being established, it is murder of the second degree, and, if the

defendant desires to reduce it to a lower degree of homicide, he must establish that by the evidence, in your minds, to your satisfaction." The charge further declared as follows: "The burden of proof of self-defense is upon the prisoner. He must show to the satisfaction of the jury a situation and circumstances under which the right may be lawfully exercised, and, before his defense is complete, those facts and circumstances must appear to bring the act done by the prisoner within the prescribed limits." These instructions, I think, clearly deprived the prisoner of the benefit of the principle that an accused person shall not be convicted of any offense, unless his guilt thereof be proved beyond reasonable doubt; for, if the evidence raised in the minds of the jurors reasonable doubt whether the facts existed, on which the homicide would be manslaughter only, but did not establish such facts in the minds of the jurors, to their satisfaction, then, as between murder and manslaughter, the jury must, according to these instructions, convict the prisoner of murder; and if the evidence raised in their minds reasonable doubt whether the situation and circumstances were such as made the homicide excusable, because committed in self-defense, but did not show such situation and circumstances to the satisfaction of the jury, then, as between a conviction of murder and an acquittal on the ground of self-defense, the jury must, according to these instructions, convict. Yet, in either of these conditions of proof, the jury would be convicting the prisoner of murder, when the whole evidence created in their minds reasonable doubt whether he was guilty of murder. Such a conviction would be in violation of the fundamental principles of our criminal jurisprudence. I think it plain that in this case there were, besides the killing, two principal matters, one or the other of which ought to have been established beyond reasonable doubt, in the minds of the jury, before they could properly convict the prisoner of murder. One of these matters was that Gebhardt's

attempt to arrest the prisoner was legal. If that was shown beyond reasonable doubt, then the prisoner was proved to be guilty of murder. But certainly the legality of the arrest could not be assumed; and, if it was not proved, the arrest should have been treated as any unlawful interference with personal liberty—as an act which may be lawfully resisted. The other matter would present itself for consideration, if the evidence failed to prove beyond reasonable doubt the legality of the arrest, and was whether, in resisting the arrest, the prisoner resorted to malicious, wanton, or unreasonable violence; for if the prisoner, in resisting the illegal arrest, was not shown beyond reasonable doubt to have acted maliciously or wantonly or unreasonably, then the homicide was not proved to have been criminal at all, and, if he was not thus shown to have acted maliciously or wantonly, then the homicide was not proved to have been murder. Under the circumstances admitted at the trial, the mere killing did not, as a matter of law, establish any criminality in the prisoner, and therefore did not cast upon him the burden of establishing any fact to the satisfaction of the jury, in order to justify his acquittal. On the contrary, he was entitled to an acquittal, notwithstanding the killing, unless, upon the circumstances touching the legality of the arrest, or the maliciousness, wantonness or unreasonableness of the prisoner's conduct, the jury came to an undoubting conclusion adverse to his claims. The direction to the jury that they should convict the prisoner of murder, unless his claims on those points were substantiated to their satisfaction, was, in my opinion, erroneous. Although, in another part of the charge, the jury were told, in general terms, to give the prisoner the benefit of reasonable doubt, yet in the explicit directions above quoted this general instruction was practically withdrawn as to all contested questions, and the starting point for the deliberation of the jury was declared to be, not a presumption of his innocence, with

the burden resting on the state to prove his guilt beyond reasonable doubt, but an assumption of the prisoner's guilt of murder, with the burden resting on him to establish to the satisfaction of the jury the illegality of his arrest, and such other facts as would mitigate the offense or excuse the homicide. So intelligible and so definite was the course which the learned judge thus marked out for the jury, that I am unable to assure myself that the verdict of the jury does not rest upon this view of their duty, and therefore I conclude that the judgment should be reversed.

Endorsed: "Filed March 6, 1899. George Wurts, Clerk."

BROWN *v.* NEW JERSEY.

ERROR TO THE COURT OF OYER AND TERMINER OF HUDSON COUNTY, STATE OF NEW JERSEY.

No. 290. Argued October 30, 1899. — Decided November 20, 1899.

Sections 75 and 76, of Chapter 237 of the Laws of New Jersey of 1898, contained the following provisions: "Sec. 75. The Supreme Court, Court of Oyer and Terminer and Court of Quarter Sessions, respectively, or any judge thereof, may on motion in behalf of the State, or defendant in any indictment, order a jury to be struck for the trial thereof, and upon making said order the jury shall be struck, served and returned in the same manner as in case of struck juries ordered in the trial of civil causes, except as herein otherwise provided." "Sec. 76. When a rule for a struck jury shall be entered in any criminal case, the court granting such rule may, on motion of the prosecutor, or of the defendant, or on its own motion, select from the persons qualified to serve as jurors in and

Statement of the Case.

for the county in which any indictment was found, whether the names of such persons appear on the sheriff's book of persons qualified to serve as jurors in and for such county or not, ninety-six names, with their places of abode, from which the prosecutor and the defendant shall each strike twenty-four names in the usual way, and the remaining forty-eight names shall be placed by the sheriff in the box in the presence of the court, and from the names so placed in the box the jury shall be drawn in the usual way." By sections 80 and 81 it was provided that where there is no struck jury, and the party is on trial for murder, he is entitled to twenty peremptory challenges, and the State to twelve; but in the case of a "struck jury" each party is allowed only five peremptory challenges: *Held*,

(1) That these provisions are not in conflict with the Constitution of the United States;

(2) That the highest court of the State of New Jersey having held that they are not in conflict with the constitution of that State, this court is foreclosed on that question by that decision.

THE plaintiff in error was, on October 5, 1898, in the Court of Oyer and Terminer of Hudson County, New Jersey, found guilty of the crime of murder. On March 6, 1899, the judgment of the Court of Oyer and Terminer was affirmed by the New Jersey Court of Errors and Appeals, and the case being remanded to the trial court, plaintiff in error was, on April 19, 1899, sentenced to be hanged. The jury which tried the case was what is known to the New Jersey statutes as a "struck jury," authority for which is found in c. 237, Laws of New Jersey, 1898, p. 894. Sections 75 and 76 read as follows:

"SEC. 75. The Supreme Court, Court of Oyer and Terminer and Court of Quarter Sessions, respectively, or any judge thereof, may, on motion in behalf of the State, or defendant in any indictment, order a jury to be struck for the trial thereof, and upon making said order the jury shall be struck, served and returned in the same manner as in case of struck juries ordered in the trial of civil causes, except as herein otherwise provided.

"SEC. 76. When a rule for a struck jury shall be entered in any criminal case, the court granting such rule may, on motion of the prosecutor, or of the defendant, or on its own motion, select from the persons qualified to serve as jurors in and for

the county in which any indictment was found, whether the names of such persons appear on the sheriff's book of persons qualified to serve as jurors in and for such county or not, ninety-six names, with their places of abode, from which the prosecutor and the defendant shall each strike twenty-four names in the usual way, and the remaining forty-eight names shall be placed by the sheriff in the box, in the presence of the court, and from the names so placed in the box the jury shall be drawn in the usual way."

By sections 80 and 81 of that statute, where there is no "struck jury" and the party is on trial for murder, he is entitled to twenty peremptory challenges and the State to twelve, but in the case of a "struck jury" each party is allowed only five peremptory challenges.

Mr. William D. Daly for plaintiff in error. *Mr. Joseph M. Noonan* was with him on the brief.

Mr. James S. Erwin for defendant in error.

Mr. Justice Brewer, after making the above statement of the case, delivered the opinion of the court.

That the statutory provisions for a struck jury are not in conflict with the constitution of New Jersey is for this court foreclosed by the decision of the highest court of the State. *Louisiana* v. *Pilsbury*, 105 U. S. 278, 294; *Hallinger* v. *Davis*, 146 U. S. 314, 319; *Forsyth* v. *Hammond*, 166 U. S. 506.

The first ten amendments to the Federal Constitution contain no restrictions on the powers of the State, but were intended to operate solely on Federal Government. *Barron* v. *Baltimore*, 7 Pet. 243; *Fox* v. *Ohio*, 5 How. 410; *Twitchell* v. *Commonwealth*, 7 Wall. 321; *United States* v. *Cruikshank*, 92 U. S. 542, 552; *Spies* v. *Illinois*, 123 U. S. 131; *In re Sawyer*, 124 U. S. 200, 219; *Eilenbecker* v. *District Court of Plymouth County*, 134 U. S. 31; *Davis* v. *Texas*, 139 U. S. 651; *McElvaine* v. *Brush*, 142 U. S. 155; *Thorington* v. *Montgomery*, 147 U. S. 490; *Miller* v. *Texas*, 153 U. S. 535.

The State has full control over the procedure in its courts, both in civil and criminal cases, subject only to the qualification that such procedure must not work a denial of fundamental rights or conflict with specific and applicable provisions of the Federal Constitution. *Ex parte Reggel*, 114 U. S. 642; *Iowa Central Railway* v. *Iowa*, 160 U. S. 389; *Chicago, Burlington & Quincy Railroad* v. *Chicago*, 166 U. S. 226. "The Fourteenth Amendment does not profess to secure to all persons in the United States the benefit of the same laws and the same remedies. Great diversities in these respects may exist in two States separated only by an imaginary line. On one side of this line there may be a right of trial by jury, and on the other side no such right. Each State prescribes its own modes of judicial proceeding." *Missouri* v. *Lewis*, 101 U. S. 22, 31.

The State is not tied down by any provision of the Federal Constitution to the practice and procedure which existed at the common law. Subject to the limitations heretofore named it may avail itself of the wisdom gathered by the experience of the century to make such changes as may be necessary. For instance, while at the common law an indictment by the grand jury was an essential preliminary to trial for felony, it is within the power of a State to abolish the grand jury entirely and proceed by information. *Hurtado* v. *California*, 110 U. S. 516.

In providing for a trial by a struck jury, empanelled in accordance with the provisions of the New Jersey statute, no fundamental right of the defendant is trespassed upon. The manner of selection is one calculated to secure an impartial jury, and the purpose of criminal procedure is not to enable the defendant to select jurors, but to secure an impartial jury. "The accused cannot complain if he is still tried by an impartial jury. He can demand nothing more. *Northern Pacific Railroad* v. *Herbert*, 116 U. S. 642. The right to challenge is the right to reject, not to select a juror. If from those who remain an impartial jury is obtained, the constitutional right of the accused is maintained." *Hayes* v. *Missouri*, 120 U. S. 68, 71.

Due process and equal protection of the laws are guaranteed by the Fourteenth Amendment, and this amendment operates to restrict the powers of the State, and if trial by a struck jury conflicts with either of these specific provisions it cannot be sustained. A perfectly satisfactory definition of due process may perhaps not be easily stated. In *Hurtado* v. *California*, 110 U. S. 516, 537, Mr. Justice Matthews, after reviewing previous declarations, said: "It follows that any legal proceeding enforced by public authority, whether sanctioned by age and custom or newly devised in the discretion of the legislative power, in furtherance of the general public good, which regards and preserves these principles of liberty and justice, must be held to be due process of law." In *Leeper* v. *Texas*, 139 U. S. 462, 468, Chief Justice Fuller declared "that law in its regular course of administration through courts of justice is due process, and when secured by the law of the State the constitutional requirement is satisfied." Within any and all definitions trial by a struck jury in the manner prescribed must, when authorized by a statute, valid under the constitution of the State, be adjudged due process. A struck jury was not unknown to the common law, though, as urged by counsel for plaintiff in error, it may never have been resorted to in trials for murder. But if appropriate for and used in criminal trials for certain offences, it could hardly be deemed essentially bad when applied to other offences. It gives the defendant a reasonable opportunity to ascertain the qualifications of proposed jurors, and to protect himself against any supposed prejudices in the mind of any particular individual called as a juror. Whether better or not than any other method, it is certainly a fair and reasonable way of securing an impartial jury, was provided for by the laws of the State, and that is all that due process in this respect requires.

It is said that the equal protection of the laws was denied because the defendant was not given the same number of peremptory challenges that he would have had in a trial before an ordinary jury. In the latter case he would have been entitled under the statute to twenty peremptory challenges, but when a struck jury is ordered he is given only five.

But that a State may make different arrangements for trials under different circumstances of even the same class of offences, has been already settled by this court. Thus, in *Missouri* v. *Lewis*, 101 U. S. 22, in certain parts of the State an appeal was given from a final judgment of a trial court to the Supreme Court of the State, while in other parts this was denied; and it was held that a State might establish one system of law in one portion of its territory and a different system in another, and that in so doing there was no violation of the Fourteenth Amendment. So, in *Hayes* v. *Missouri*, 120 U. S. 68, it appeared that a certain number of peremptory challenges was allowed in cities of over 100,000 inhabitants, while a less number was permitted in other portions of the State. It was held that that was no denial of the equal protection of the laws, the court saying, page 71: "The Fourteenth Amendment to the Constitution of the United States does not prohibit legislation which is limited either in the objects to which it is directed, or by the territory within which it is to operate. It merely requires that all persons subjected to such legislation shall be treated alike, under like circumstances and conditions, both in the privileges conferred and in the liabilities imposed."

It is true that here there is no territorial distribution, but in all cases in which a struck jury is ordered the same number of challenges is permitted, as similarly in all cases in which the trial is by an ordinary jury. Either party, State or defendant, may apply for a struck jury, and the matter is one which is determined by the court in the exercise of a sound discretion. There is no mere arbitrary power in this respect, any more than in the granting or refusing of a continuance. The fact that in one case the plaintiff or defendant is awarded a continuance and in another is refused does not make in either a denial of the equal protection of the laws. That in any given case the discretion of the court in awarding a trial by a struck jury was improperly exercised may perhaps present a matter for consideration on appeal, but it amounts to nothing more.

Perceiving no error in the record, the judgment is

Affirmed.

Mr. Justice Harlan concurred in the result.